

ELBIT SYSTEMS LAND AND C4I, LTD vs HUGHES NETWORK SYSTEMS, LLC, ET AL
PRETRIAL CONFERENCE, on 07/20/2017

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION
4 ELBIT SYSTEMS LAND AND)(
5 C4I LTD AND ELBIT SYSTEMS)(CIVIL DOCKET NO.
6)(2:15-CV-00037-RWS-RSP
7 vs.)(MARSHALL, TEXAS
8)(
9 HUGHES NETWORK SYSTEM,)(
10 LLC., ET AL)(JULY 20, 2017

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12
13 PRETRIAL CONFERENCE
14 BEFORE THE HONORABLE ROY S. PAYNE
15 UNITED STATES MAGISTRATE JUDGE
16

17 APPEARANCES:

18 FOR THE PLAINTIFF: (See sign-in sheets docketed in
19 minutes of this hearing.)

20 FOR THE DEFENDANT: (See sign-in sheets docketed in
21 minutes of this hearing.)
22

23 COURT REPORTER: Ms. Tammy L. Goolsby, CSR

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25 by a Computer

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903-445-5355

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I N D E X

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1 P R O C E E D I N G S

2 COURT SECURITY OFFICER: All rise.

3 THE COURT: Good afternoon. Please be seated.

4 For the record, we're here for the completion of the
5 Pretrial Conference in Elbit Systems versus Hughes Network
6 Systems, Case No. 2:15-37 on our docket.

7 Would counsel state their appearances for the record?

8 MR. HILL: Good afternoon, Your Honor. Wesley Hill
9 on behalf of Plaintiffs. With me today is Ms. Andrea Fair,
10 Ranga Sudarshan, Patrick Flynn, Wallace Lee, and Yale Fu, and
11 we are ready to proceed with the evidentiary hearing.

12 THE COURT: All right. Thank you, Mr. Hill.

13 MS. SMITH: Good afternoon, Your Honor. Melissa
14 Smith on behalf of Hughes. I'm joined by Kurt Pankratz, Mr.
15 Chris Ponder, Ms. Melissa Butler, Mr. Brad Bowling, and Mr.
16 Ali Dhanani, and we're ready to proceed, Your Honor.

17 THE COURT: All right. Thank you, Ms. Smith.

18 I know that there has been a motion filed seeking a
19 stay or continuance, and I would like to hear argument on that
20 before we move on to the matters regarding exhibits, so if
21 whoever wants to address that on behalf of the Movant?

22 MR. PANKRATZ: Thank you, Your Honor. Kurt Pankratz
23 for Defendant.

24 We filed the emergency stay yesterday in view of the
25 fact that we have also filed writs at the Federal Circuit

1 seeking clarification on unsettled law on the state of venue,
2 as well as the convenience transfer.

3 We believe that similar to the Cray case in front of
4 Gilstrap, which Judge Gilstrap sua sponte stayed pending
5 Federal Circuit review, I believe, yesterday he stayed the Cray
6 case, that this case should be stayed so that the Federal
7 Circuit can sort out what the state of the law is and we can
8 figure out before we waste a lot of resources going through a
9 trial that we can figure out what the state of the law will be
10 going forward on where this case should proceed.

11 THE COURT: All right. I was frankly confused when
12 I read the writ that y'all filed yesterday because it
13 really -- it didn't look like the case that I ruled on, but I
14 didn't see a mention of waiver until halfway through it.
15 I'm -- in any event, what -- how does your writ request
16 address the waiver issue?

17 MR. PANKRATZ: Your Honor, the writ does address two
18 separate, both the 1404 and 1406 transfers, and the 14 -- I
19 was not intimately involved in the drafting of that, so you'll
20 have to forgive me if I can't recite everything in there.

21 But the waiver is addressed, Your Honor, through the
22 fact that it is Defendant's position that there was no waiver
23 because the defense of improper venue was maintained in the
24 original answer that was filed in this complaint.

25 The Defendants in that answer reserved the right to

1 challenge the venue based on the T.C. Heartland case, which at
2 the time was pending at the Federal Circuit. There had been no
3 decision there. The Defendants are of the position that that
4 was a reservation and a preservation of their rights to
5 challenge venue and, thus, there has been no waiver.

6 THE COURT: And that's the sentence that started by
7 saying Hughes does not contest that venue is proper?

8 MR. PANKRATZ: Correct, Your Honor. We were not
9 contesting other than by reserving the right to challenge it
10 should the T.C. Heartland case changed the state of the law,
11 and the sentence we believe should be read in its entirety,
12 and it certainly was in no way what the Plaintiffs have
13 chopped it up to say that we admitted venue was proper. We
14 did not -- we did not at that time file a motion to contest
15 venue, but we reserved the right to challenge it should the
16 law change.

17 THE COURT: You were expecting then the Court to
18 proceed with the case as we have done because you did not
19 contest venue.

20 MR. PANKRATZ: Your Honor, I believe we did. We
21 were challenging that venue was proper.

22 THE COURT: Did you file a motion to dismiss?

23 MR. PANKRATZ: We did not, Your Honor.

24 THE COURT: You did file a motion to dismiss earlier
25 that did not include venue; right?

1 MR. PANKRATZ: Yes, Your Honor, we did.

2 THE COURT: And is that your understanding of the
3 way Rule 12 works, that you can file a motion under Rule 12B
4 that doesn't include venue and then come back later and move
5 to dismiss based on venue?

6 MR. PANKRATZ: I would -- I would say two things in
7 response to that question, Your Honor. First, we believed
8 that if the original answer preserves a dispute as to venue,
9 which our first answer did --

10 THE COURT: This is after the Rule 12 motion had
11 been filed.

12 MR. PANKRATZ: Correct, Your Honor. But we believe
13 that under Rule 12 that is still a proper preservation, and we
14 also believe that a Rule 12 motion and the operation of Rule
15 12 requires only that those issues that were available be
16 raised in a Rule 12 motion and that the defense of improper
17 venue at the time this Court had written its opinion was a --
18 not a meritorious defense and that it would have been
19 frivolous for us to have filed such a motion because the state
20 of the law at the time was that it was not an available
21 defense to us.

22 THE COURT: Now, one of your Co-Defendants did file
23 a motion to dismiss based on improper venue --

24 MR. PANKRATZ: Correct, sir.

25 THE COURT: -- proceeding on a similar theory to the

1 one you're asserting now?

2 MR. PANKRATZ: No, it was -- it was a different
3 theory for that Defendant. That Defendant was a
4 Louisiana-based company that did not sell to any -- as I
5 understand it, and I'm stretching the bounds of my memory and
6 recollection, but my recollection from reading the papers on
7 that is that the company did not sell to any companies
8 actually in the district. They sold for use in offshore
9 activities.

10 THE COURT: And so tell me again how your
11 understanding of Rule 12 is that you can file a Rule 12B
12 motion and not waive something as long as you later include it
13 in an answer.

14 MR. PANKRATZ: Will Your Honor indulge me just a
15 second while I pull up the text of Rule 12?

16 THE COURT: Okay.

17 MR. PANKRATZ: To begin, Your Honor, Rule 12B, how
18 to present defenses, states that every defense to a claim for
19 relief in any pleading must be asserted in the responsive
20 pleading if one is required.

21 And we would argue that Hughes did in its responsive
22 pleading identify improper venue and reserve its right to
23 challenge to the extent that the law changed, and we believe
24 that that was the most efficient way of doing so, rather than
25 wasting this Court's time with yet another order saying that we

1 had filed a meritorious and frivolous motion under Rule 12.

2 THE COURT: I don't think that your analysis is
3 addressing Rule 12H which deals with waiver, but in any
4 event --

5 MR. PANKRATZ: And for that, Your Honor, I
6 believe -- and I'm missing the part where it talks about
7 availability, but it makes clear that the motion must only
8 address those defenses that are available, and we contend that
9 something that is contrary to law is not an available defense.

10 THE COURT: So when the Supreme Court said that the
11 Fourco decision was the law in 1957 and remains the law 60
12 years after, are you saying that they were wrong?

13 MR. PANKRATZ: Your Honor, you're -- you're catching
14 a lowly trial court lawyer here with Supreme Court law. I
15 don't know the exact response to give you other than the state
16 of the law as it was applied in this district and throughout
17 the country was as articulated based on the change of the law
18 as interpreted by the Federal Circuit.

19 And so Fourco was the law. Then the statutes were
20 altered. The altered statutes were interpreted by the Federal
21 Circuit, and that was the law that was applied for 40 years,
22 and as this Court acknowledged, it was a meritless motion
23 under the state of the law as it existed to file a motion to
24 transfer for improper venue back in 2015 or so when this case
25 was filed, and so we would submit that the law has changed.

1 THE COURT: Well, we could discuss that matter. I
2 have concerns about the fact that you did not file your motion
3 for convenience transfer until almost a year and a half after
4 the case was filed. When you filed it, you didn't file it as
5 a motion so that it would come to the Court's attention.

6 And I understand now that you contend that you did
7 bring it to our attention and we ignored it by mentioning it at
8 the bottom of your joint claim construction and pre-hearing
9 statement as a clause after a sentence that begins Defendants
10 do not believe that there are any motions that are necessary
11 for the Court to resolve prior to the claim construction
12 hearing; however, and then you mention this motion.

13 MR. PANKRATZ: Respectfully, Your Honor, we believed
14 that the best way to raise it with the Court and not be
15 pestering was to flag it as a motion that should be heard
16 before this Court engaged in any substantive patent activities
17 with respect to this, that the Markman hearing would be the
18 first time this Court began to substantively dig into this
19 case, and we thought that the -- again, the best way to raise
20 it was to note it, request that it be ruled on before the
21 Markman proceedings began, and that was the path we took.

22 So respectfully, Your Honor, we thought we were doing
23 the right thing in terms of when we raised it with the Court,
24 and that was the intention.

25 THE COURT: This -- you understand that this

1 document, this joint claim construction pre-hearing statement,
2 is largely a matter for notice between the parties that rarely
3 even comes to the Court's attention, and putting it in this
4 was what you thought was the best way to bring to our
5 attention that you had misfiled this motion?

6 MR. PANKRATZ: Your Honor, we -- I respectfully am
7 now hearing that that is not something for notice to the
8 Court, and I apologize if we misunderstood the purpose of
9 that -- that filing. We thought we were bringing it to the
10 Court's attention.

11 And I understand now that whether or not it was filed
12 as a motion or brought to the Court's attention is really not
13 an issue that's being addressed going forward because I
14 understand that that was viewed as not truly relevant to the
15 determination ultimately on the convenience motion in Judge
16 Schroeder's opinion.

17 And, again, I have not read word for word all these
18 different opinions and orders, but my understanding is that
19 Judge Schroeder's ultimate decision to affirm Your Honor rested
20 on his perceived problems about when the transfer motion was
21 filed and then ultimately analysis of the Gilbert Volkswagen
22 factors.

23 THE COURT: All right. Thank you, Mr. Pankratz.

24 MR. PANKRATZ: Thank you, Your Honor.

25 THE COURT: Mr. Hill?

1 MR. HILL: Thank you, Your Honor.

2 Your Honor, I think that the Mandamus petition that
3 has been filed by the Defendants in this case Hughes Network
4 Systems is a dishonest presentation of the facts. It's a
5 dishonest presentation of what occurred in this Court, and it
6 is in -- it is made on the hope that by presenting those facts
7 in a misleading fashion, they might convince the Appellate
8 Court that something has happened here that hasn't and, as a
9 result, trigger some emergency relief before we have a chance
10 to file our responsive papers with the Appellate Court and
11 correct that record.

12 Now, we hope that won't happen. We hope the
13 Appellate Court first will look at this Court's order, Judge
14 Schroeder's order, the transcript from the hearing with Judge
15 Schroeder last Friday, all of which contain an accurate
16 reflection of the actual facts of what went on in this Court,
17 and hopefully this attempt to mislead will fail.

18 But, Your Honor, I want to talk about three specific
19 things, and the Court has hit on several of them that I think
20 bear that out, and they're relevant.

21 The reason I raise it now, Your Honor, is not simply
22 to inflame or throw mud; but it is because it is relevant to a
23 stay, I think, because a stay is a remedy that a party must
24 seek in good faith and a remedy that a party is only entitled
25 to if they come to a Court with relatively clean hands in terms

1 of yes they want it. It can't just be a dilatory tactic, and
2 we suggest that's what is.

3 Your Honor, they present to the Court of Appeals that
4 they preserved in an original answer -- I think that's a bit of
5 a misleading term -- what clearly was waived previously without
6 acknowledging the prior motion to dismiss and the plain
7 operation of Rule 12H1A. They filed a motion to dismiss that
8 didn't raise venue. The rule text is plain. That's waiver.

9 They pretend, Your Honor, in the motion, the
10 Mandamus, that we dismissed parties suddenly because we're
11 venue manipulators upon this Court's decision on the 1404A
12 motion, pretending that it happened just days later for the
13 first time out of surprise.

14 They say that despite months earlier, knowing that
15 months earlier, 45 days or so earlier at least, we had raised
16 with them our offer to dismiss those parties prior to this
17 Court's decision on the 404A motion, and, in fact, this Court
18 discussed that offer in your order docket number 388 when you
19 ruled on the 1406 issues.

20 They don't tell the Appellate Court that. They
21 didn't tell Judge Schroeder about that. I pointed that out to
22 him. Showed him the email strings where those issues came up
23 on June 5th, well before this order.

24 And they pretend that the case that this Court has
25 previously decided the 1400B issue, the substantive issue of

1 does Hughes have a regular and established place of business in
2 the district, an issue the Court knows you didn't address, you
3 decided this matter on waiver, you didn't reach those points,
4 yet they asked the Court of Appeals in a Mandamus context for
5 the first time to decide that issue and hold this Court abused
6 its discretion when you've not even had a chance to exercise
7 your judgment on that point.

8 Your Honor, all these things show that this is not an
9 honest effort for a stay. This is a chance to delay. It's a
10 dilatory tactic that is yet one of many more we've seen in this
11 case and what we've -- more importantly what we see, Your
12 Honor, is that if a stay was granted in this case -- and,
13 again, we have not had our chance -- I'll confess to Your
14 Honor. I haven't read their motion to stay filed late
15 yesterday. I was preparing for this hearing.

16 But what we see, Your Honor, is if they are granted a
17 stay, what we have done is we have rewarded dilatory conduct, a
18 party that delayed 16 months from the filing of suit
19 inexplicably until they finally filed a motion to transfer
20 venue on a convenience basis.

21 They tell Judge Schroeder that that delay was because
22 they had learned about this new entity Sevis. They blame us
23 because we alerted them in, they say, the second amended
24 complaint to the existence of a component supplier. What we
25 know, what we showed Judge Schroeder, Your Honor, is that we

1 attached exhibits to our original complaint which address
2 Sevis, their component supplier for the accused system, which
3 is in Denton, Texas, in the district.

4 What we would do with the stay now, Your Honor, is
5 reward delay. We would reward a party for letting these issues
6 come up at the end of a case, for doing exactly what the case
7 law has said is the reason a party can waive venue defenses by
8 not being diligent so that this doesn't happen, so that on the
9 eve of trial we don't face dilatory pleas on preliminary
10 matters like venue.

11 Your Honor, it would be highly prejudicial to Elbit
12 at this stage to continue a case on the cusp of a trial after
13 the logistics have been arranged, witnesses from all over the
14 globe have been arranged, and we stand fully ready to go to
15 trial on a case that Hughes has had just as long as we have had
16 to fully litigate if they wished.

17 The one last thing I'll mention, Your Honor, with
18 regard to the PR4-3 notice they say should have alerted this
19 Court, that PR4-3 notice was filed two months after their
20 original motion to transfer venue. They don't offer this Court
21 any explanation for what they did for those next 11 months.
22 They sat for 11 months after that PR4-3 statement without
23 uttering a peep. Inexcused delay is exactly what this Court
24 found. A stay would only reward such conduct, and we would ask
25 the Court to deny any motion for stay.

1 If the Court is going to give any serious
2 consideration to the motion to stay, Your Honor, I think the
3 Court can deny it on the record that exist. I would hope we
4 aren't put through the additional burden of being distracted
5 from our trial preparations to have to draft a written response
6 and file it, but if the Court believes that would be
7 beneficial, we would certainly do it.

8 THE COURT: All right. Mr. Hill, I will let you
9 know if you need to file a written response, so at this point,
10 unless you hear from the Court that you do, don't.

11 MR. HILL: Thank you, Your Honor.

12 MR. PANKRATZ: Your Honor, may I follow?

13 THE COURT: Yes, certainly.

14 MR. PANKRATZ: Certainly I take offense at being
15 called dishonest, misleading. I think that's strong language,
16 and I'm going to step through.

17 Again, I was not the lawyer present arguing against
18 Mr. Hill on all of these issues, but I think I know enough of
19 the facts to know that he's not being honest when he says we're
20 not being honest. I believe there is an honest dispute between
21 the parties. Each side has a position, but, again, we are not
22 being dishonest in any way, and I take offense to that. I
23 don't think that's fair.

24 Let me first again address why I think the motion to
25 stay should be granted. There is no question that there is an

1 unsettled state of the law right now as to what will constitute
2 a waiver or not, and whether or not we put it in a Rule 12 or
3 put it in our answer is really ignoring the fact that the
4 Federal Circuit will very likely be making a decision on
5 whether you could possibly have waived the T.C. Heartland
6 defense at all.

7 And so to say that we're being dishonest by telling
8 them we put it in our original answer, we think that
9 distinguishes us from some of the others that the Federal
10 Circuit is considering, but, again, it's unsettled state of the
11 law, and we believe that the stay is appropriate, just as it
12 was in the Cray case that, again, Judge Gilstrap sua sponte
13 stayed, that the stay is appropriate here.

14 And I would like to answer a couple of these specific
15 points of supposed dishonesty. He says we pretend they
16 dismissed suddenly these parties and that we were somehow
17 surprised.

18 We didn't say we were surprised. We said it was very
19 clear that the sudden dismissal basically before the Court even
20 opened up the next day of these parties that they had, in our
21 view, added purely for venue reasons is proof that they had
22 added them purely for venue reasons and --

23 THE COURT: Even though they offered to dismiss them
24 before the Court had ruled on the venue motion.

25 MR. PANKRATZ: Your Honor, they offered to dismiss

1 them only for the first time when we met and conferred on the
2 1406 improper venue motion, and we think it's clear that they
3 did so because one of those Defendants Bluetide -- there was
4 virtually no dispute that venue was improper for Bluetide.
5 Bluetide had filed a 12B improper motion and that they didn't
6 have a chance of fighting on it.

7 And so we think, again, it was, you know, they
8 suddenly found that the anchor they thought for -- was there
9 for maintaining convenience transfer suddenly became an anchor
10 on them for trying to fight 1406 improper venue.

11 And in offering to drop those parties, they said that
12 we had to drop them, but give up our right for attorneys' fees,
13 something that we even had to bring to Your Honor for
14 resolution, and we didn't think that was fair. If those
15 parties were dismissed, we wanted to preserve our right, as
16 we're entitled to for those parties, for them to seek
17 attorneys' fees.

18 So, again, it wasn't that there was some massive
19 surprise that they dropped them less than a court day later.
20 In fact, that wasn't surprising. It was merely the timing of
21 waiting to get rid of them until right after the convenience
22 motion is decided. That was in our minds the important point
23 there.

24 They say we pretend to the Federal Circuit that the
25 Court addressed the underlying 1406 regular and established

1 place of business. Again, I have not read the brief in
2 word-for-word, but I would be shocked if it could be
3 characterized as pretending that the Court did anything that
4 the Court did not. We -- we are accurate and cite to the
5 record, I'm confident of that.

6 And then the 16-month delay and this repeated
7 statement that it's inexplicable, in his next breath Mr. Hill
8 brought out some of the very reasons why there was an
9 explanation. There were multiple complaints filed.

10 And, Your Honor, I understand that there's an honest
11 dispute between the parties and that the Court has viewed this
12 and viewed it in a different lens than we do, but we believed
13 that --

14 THE COURT: I don't think there is an honest dispute
15 that an amended complaint does not resuscitate venue
16 objections between the same parties.

17 MR. PANKRATZ: And -- I -- I guess I don't
18 understand the Court's -- are you talking about convenience?

19 THE COURT: I'm talking about venue.

20 MR. PANKRATZ: For -- for -- under 1400?

21 THE COURT: I don't care what provision you're
22 under. Venue is something that you have to raise in
23 connection with the original complaint, and if you don't, you
24 don't get a chance to raise it again when there's an amended
25 complaint.

1 MR. PANKRATZ: Your Honor, I would contend that for
2 a convenience motion, the Fifth Circuit law states that as
3 long as you file it within a reasonable period of time that it
4 is -- that the timeliness of it can't be used to deny it.

5 THE COURT: And what is -- how does waiting 16
6 months amount to a reasonable period of time? You didn't
7 realize that you were based in Maryland and we're in Texas
8 until 16 months later?

9 MR. PANKRATZ: Your Honor, again, I -- I was not the
10 attorney who prepared this. I -- I wish I had the slide
11 sitting in front of us because there is a lot of activity in
12 that 16-month period of time in which, for example, Hughes
13 raises with them that we intend to file the motion to transfer
14 for convenience.

15 They delay for a period of many weeks, only after --
16 and this is more than six months before the motion was filed.
17 We're attempting to get this on file. They are delaying our
18 ability to do so. They, being Elbit, are refusing to meet and
19 confer. Only when they finally say, okay, let's put a meet and
20 confer on the calendar, right before they meet and confer, they
21 file an amended complaint that adds venue-related facts.

22 We then go back to follow up on those specific facts,
23 find the witnesses that are implicated by it, and actually find
24 that those witnesses -- the witness is in Virginia, get a
25 declaration from that third party witness, and then two weeks

1 after, or less, it might have been a matter of days after
2 obtaining that third party witness' declaration where they are
3 in availability, we filed the motion to transfer.

4 I don't know all the specific other instances, but,
5 Your Honor, I can say we Hughes were taking steps to file that
6 motion, and I would submit that the amended complaints, the
7 dilatory tactics on the meet and confer, the identification of
8 new third party witnesses, were things that we had to overcome
9 before we could file it.

10 And so it wasn't a matter of us sitting for 16 months
11 and then suddenly waking up and deciding we should file this
12 motion.

13 THE COURT: You know, the tone that I may be
14 reflecting in my voice is based on the fact that this petition
15 or Mandamus misrepresents the record of these proceedings in
16 that it suggests to the Circuit Court that venue is something
17 that you were hotly contesting and that the Court was
18 deliberately ignoring and does not have any dates in it in the
19 opening section by which a reader would come to understand
20 that 16 months went by between the filing of the complaint and
21 your motion asserting it and that you filed the motion under a
22 clearly wrong event code.

23 And we have been together in this courtroom as often
24 on this case as any case I can recall, and nobody brought this
25 up, and then you say that the fact that it was mentioned in

1 this joint claim construction statement under a however clause
2 should have given us notice, and that petition states that this
3 Court, being me, was deliberately ignoring your motion to
4 transfer, and that's not true.

5 MR. PANKRATZ: I apologize sincerely if there is a
6 misrepresentation of this Court that's in that filing. I do
7 sincerely apologize.

8 THE COURT: I don't know that I have ever commented
9 on the record before about an appellate filing, but it's hard
10 for me to hear this discussion and not say that.

11 In any event, we'll get a ruling on your emergency
12 motion to stay, and let's move on to the exhibit matters that
13 bring us here.

14 MR. PANKRATZ: Thank you, Your Honor, and thank you
15 for raising this. I appreciate you.

16 THE COURT: All right.

17 MR. PANKRATZ: Thank you.

18 THE COURT: Thank you, Mr. Pankratz.

19 MR. HILL: Your Honor, we're certainly open to the
20 Court's guidance about how you would like to address the
21 exhibit issues. There are a couple of, I think, broader
22 exhibit issues that we can tee up first if the Court would
23 like.

24 One has to do with a gentleman named Mr. Messineo.
25 He's the gentleman who was deposed in relation to the PES

1 demonstration. This grew out of our last hearing, Your Honor.
2 You'll recall we had a motion in limine to preclude the PES
3 system and demonstrative demonstration from occurring.

4 The Court, in the context of concern about the
5 authenticity of that system, allowed an additional deposition
6 to occur. That deponent was this Mr. Messineo, so it occurred
7 just this past week, and Mr. Sudarshan is prepared to argue
8 that point based upon the result of that deposition, if that
9 would be of aide to the Court. We would propose that we start
10 there.

11 The second issue, Your Honor, again, a remnant from
12 before, was our trial procedure stipulation. The parties have
13 narrowed that substantially. We have a few minor disputes
14 there that we'll need to get resolved.

15 But other than that, Your Honor, we then have our
16 respective exhibit lists, and we have categorized the
17 objections and would be prepared to present those to the Court.

18 THE COURT: All right. Let's start with the
19 exhibits, and we'll take up the trial procedures and the
20 carried motion in limine afterwards.

21 MR. HILL: Your Honor, we would ask to start with
22 Defendant's objections to Plaintiff's exhibits in the first
23 instance, and I'll get out of the way and let the Defendants
24 drive the boat there, I suppose, since they will be raising
25 the objections that they have remaining.

1 THE COURT: All right.

2 MR. PONDER: Your Honor, we actually understood that
3 we would be taking up Defendant's objections to Plaintiff's
4 exhibits first. We did not obtain a categorization of --

5 THE COURT: I think that's what we are doing.

6 MR. PONDER: Oh, sorry, Your Honor. I think I
7 got turned around.

8 THE COURT: Defendant's objections --

9 MR. PONDER: Defendant's objections to Plaintiff's
10 exhibits. Sorry.

11 THE COURT: Yes.

12 MR. PONDER: Your Honor, before the hearing, we
13 handed up to the Court a bucket list. I believe you might
14 have it.

15 THE COURT: Yes, I do have that. Thank you. That's
16 they helpful.

17 MR. PONDER: We will start with the bucket on page
18 five, which is the State of the Art, and Mr. Bowling will
19 begin.

20 MR. BOWLING: Good afternoon, Your Honor.

21 THE COURT: Good afternoon.

22 MR. BOWLING: Your Honor, the first two categories
23 of documents will be state of the art and then other materials
24 relied on by Plaintiff's infringement invalidity expert Mr.
25 Bruce Elbert.

1 So the first bucket is a very narrow one. It is PX
2 386. This is a -- this is not a document of either party. It
3 appears to be a journal article of some type. We believe that
4 it is hearsay. There's not been any authenticity testimony or
5 evidence presented that would allow its admission.

6 THE COURT: All right. Help me orient now to the
7 exhibit buckets that you have filed. Where are we in that?

8 MR. BOWLING: Yes, sir, on page five --

9 THE COURT: All right.

10 MR. BOWLING: -- at the bottom here is -- you'll
11 have to excuse the typographical error. It should be '073
12 state of the art. I hit the key next to it and it stays '037
13 date of the art.

14 THE COURT: All right. I am with you on page five
15 now. All right.

16 MR. BOWLING: So here we have the cover of PX 386
17 and you can see that it is a journal article. It's not a
18 document of either party in this case, and we've not seen any
19 testimony or other evidence.

20 THE COURT: So this is a hearsay objection then?

21 MR. BOWLING: Hearsay and authenticity, Your Honor.

22 THE COURT: Hearsay and authenticity. All right.

23 And let me hear the response to that. Thank you, Mr. Bowling.

24 MR. LEE: Your Honor, Wallace Lee for the
25 Plaintiffs.

1 This document is being offered for -- it's relevant
2 to secondary considerations and it's a -- it's also a learned
3 treatise from a journal.

4 THE COURT: All right. So if you're going to use it
5 as a learned treatise, you know it would not be an exhibit
6 that would be presented to the jury.

7 MR. LEE: It's a non-hearsay use, Your Honor,
8 because it -- because it would be used to -- only for -- to
9 show the -- I don't know what's controlling the screen right
10 now, but the reason that we would want to use this article is
11 because it talks about how the difficulties of using TCP/IP
12 over satellite links in the 1997 time frame.

13 THE COURT: It sounds like you're wanting to use it
14 for the truth of what it says. It is describing the
15 difficulties of using it?

16 MR. LEE: Your Honor, but it's not so much the truth
17 of what it says as it is what the industry believed at the
18 time or what was out there in the industry publications at the
19 time.

20 THE COURT: And so what is the relevance of the
21 industry's belief at the time if it was a mistaken belief?

22 MR. LEE: This is one of several -- it was -- it --
23 those in the art who are reading these publications at the
24 time would have seen articles about difficulties of using
25 TCP/IP over satellite links.

1 MR. HILL: Your Honor, if I may, I think it shows
2 skepticism or teaching away from the solution that the
3 inventors ultimately reached, and so what it's showing is the
4 effect on the listener, the effect on other developers out
5 there, that they would see this type of material and believe
6 this was not the path, the solution.

7 We think that's a non-hearsay use, much like prior
8 art is a non-hearsay use because you're just showing the state
9 of mind of an industry at the time through this circumstantial
10 evidence of it.

11 THE COURT: Of course, prior art is a non-hearsay
12 use because it is the fact that the art existed at the time
13 that's at issue, not whether or not it was accurate.

14 MR. HILL: Your Honor, our point with this is that
15 this -- this -- there was -- this shows, just as with prior
16 art, what was known at the time, the perception at the time.
17 Doesn't matter whether it was difficult or not, whether it was
18 actually a difficult solution.

19 But what was known at the time was it was perceived
20 as a difficult solution, and it's that perception based on
21 things of this sort that we believe establishes a non-hearsay
22 use for where it's showing the effect on the listener, the
23 effect on the relevant community here, as opposed to being
24 offered for its truth.

25 THE COURT: All right. Thank you, Mr. Hill. Let me

1 hear the response to the argument that this is being offered
2 for the fact of the utterance and not the truth.

3 MR. BOWLING: I believe, Your Honor, that to the
4 extent the article is saying that there is a problem or there
5 is some skepticism, then, in fact, they are offering the
6 article for the underlying fact that there is skepticism and,
7 therefore, it is actually a truth of the matter.

8 Furthermore, I note that this is not merely -- we're
9 not arguing over whether Mr. Elbert properly or improperly
10 considered this. We're trying to consider whether this should
11 come into evidence and go back to the jury, and whether or not
12 Mr. Elbert considered it should not be relevant for whether it
13 comes in as -- as positive evidence, Your Honor.

14 THE COURT: I agree with you on the last point. I
15 guess I'm -- still, if they are saying that the state of the
16 art is relevant, are you saying that the state of the art
17 regarding TCP/IP performance back in '97 what is not relevant?

18 MR. BOWLING: I certainly agree at the state of the
19 art is relevant, Your Honor. I think what I hear them saying,
20 though, is that we would want to see this article saying that
21 something is impossible or is otherwise very hard to do and
22 that, for example, their invention was able to turn around a
23 mistaken belief in the art, and -- and I don't think we see
24 any evidence of that.

25 THE COURT: All right. Well, I -- it does seem to

1 me that the state of the art is relevant, and, therefore, this
2 would be a non-hearsay use. As to the authenticity of the
3 document, where does it purport to be from? You mentioned, I
4 think, Mr. Bowling, that you -- it was a journal article?

5 MR. BOWLING: At the bottom it appears -- if we can
6 zoom in on the bottom here, we see that it has the mark of the
7 IEEE, but, otherwise, we don't have any other information
8 about it, other than what we see on the page itself. We
9 haven't seen any declaration or other testimony to
10 authenticate it.

11 THE COURT: Is there any reason to doubt that this
12 is an IEEE network publication?

13 MR. BOWLING: I do not know of any, Your Honor,
14 other than I've not pulled it up myself.

15 THE COURT: All right. Well, I think that
16 authenticity requires that there be sufficient evidence to
17 support a belief that it is what it represents itself to be,
18 and I -- this looks to me like an authentic copy of that
19 journal article, and I'll overrule the objection to Exhibit
20 386.

21 MR. BOWLING: Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. BOWLING: In your materials, the next bucket
24 we've called Over. It's on page 13, Your Honor.

25 THE COURT: Okay.

1 MR. BOWLING: I'll note that --

2 THE COURT: We are skipping certain buckets. Is
3 that because there's no objection in those buckets any more?

4 MR. BOWLING: No, Your Honor. It turns out that the
5 buckets are arranged in an alphabetical order, and it turns
6 out that these buckets are very similar in that they're third
7 party documents that are relied on by Mr. Elbert, so I'm
8 choosing to argue them together because I think the arguments
9 will be very similar.

10 THE COURT: All right. That's fine. I just wanted
11 to make sure I understood the procedure. Go ahead.

12 MR. BOWLING: I believe with respect to Exhibit 705
13 at the bottom, that has been withdrawn by Plaintiffs, so I
14 won't be speaking to that.

15 With respect to the remainder of the exhibits, I'd
16 like to discuss them in two sub buckets. Leaving article PX
17 383 in a second, Exhibits 382, 389, 390, and 391 are all
18 hearsay articles as well and lack of authentication.

19 THE COURT: All right.

20 MR. BOWLING: Once again, I believe Mr. Elbert
21 relies on these for secondary indicia, perhaps skepticism or
22 long felt need. It's our position, Your Honor, that any
23 statement of a long felt need or any other secondary indicia
24 is, in fact, a positive use, a truth of the matter use of
25 the -- of the articles.

1 THE COURT: All right. Thank you. Let me hear the
2 response to that objection.

3 MR. LEE: Your Honor, Mr. Bowling is correct that
4 these are relevant to objective indicia if non-obviousness,
5 and in particular these articles praise Shiron. The company
6 that the asserted patents were assigned to, they praised their
7 InterSky product.

8 THE COURT: And so what --

9 MR. LEE: So it's -- it's -- I'm sorry, Your Honor.

10 THE COURT: What is your response to the hearsay
11 objection?

12 MR. LEE: The response is that it's not the truth of
13 the matter that's asserted that the Plaintiffs are offering
14 the exhibits for, but rather that there was industry praise
15 for -- for the -- for Shiron's products.

16 THE COURT: All right. And what about the
17 authenticity objection?

18 MR. LEE: Your Honor, these -- these documents are
19 periodicals, and under 90 -- they're self-authenticating under
20 901. I don't have the subsection in front of me right now,
21 but as newspapers are periodicals.

22 THE COURT: Did Mr. Elbert in his report indicate
23 that he had found these documents? Are these documents that
24 he referred to in his report?

25 MR. LEE: I believe so, Your Honor.

1 THE COURT: All right. Can you show me a for
2 instance of one of these, how you're contending it's
3 self-authenticating?

4 MR. LEE: Yes, Your Honor. Your Honor, if you look
5 about two-thirds down the page, for example, this article
6 says, quote, the new IRG -- well, a little bit further down.

7 The IRG-30 is a powerful broadband solution for ISP
8 points of presence, corporate offices, financial institutions,
9 government offices, small and medium enterprises, and internet
10 cafes. The terminal is ideal for a wide range of IP
11 applications and allows smooth connectivity to any standard
12 equipment.

13 MR. HILL: Your Honor, if I may, to the -- I think
14 what the Court's question was about how these
15 self-authenticate.

16 If we look at the top of the page, we see the logo of
17 the publication. We see the date on which it was published,
18 the author name, and at the end we'll see including maybe
19 contact information for the publisher and that sort of thing,
20 Your Honor.

21 So I think these are the indicia of the fact that
22 this is printed material purporting to be a newspaper or
23 periodical, and that would be self-authenticating under 9026.

24 THE COURT: All right. Thank you. Let me hear the
25 response.

1 MR. BOWLING: Briefly, Your Honor, I don't believe
2 this is a self-authenticating publication.

3 If you look here at the by line, it purports to be
4 from February of 2004, but if we look at the top left, we see
5 that it was retrieved likely in February of 2016. I don't --
6 thinking back on Mr. Elbert's testimony, I did see any
7 testimony by him that he himself retrieved it in the course of
8 preparing his report. It simply was listed as material
9 considered.

10 Furthermore, if we look at the bottom of the page, we
11 have what appears to be an internet address, so it appears this
12 was, in fact, pulled from the internet and it is not a
13 periodical or other journal from a library.

14 THE COURT: Is there any reason to suspect that this
15 is not an adequate or an accurate copy of what it purports to
16 be?

17 MR. BOWLING: Your Honor, unlike the previous one,
18 you know, an IEEE journal I'm -- I'm fairly familiar with.
19 I've never heard of this periodical before this case, so I
20 simply don't know. I have not seen any articles by Space
21 Daily.

22 MR. HILL: Your Honor, being a periodical of small
23 circulation doesn't make it not a periodical, neither does
24 internet distribution in our current day and age. 9026 is not
25 limited to such. I think what we have here is an article that

1 is a -- meets the definition of the rule.

2 THE COURT: All right. I'll overrule the objection.
3 I think that it is a non-hearsay use since it is just the fact
4 of industry praise for which it's being offered, and I think
5 there is adequate authentication.

6 MR. BOWLING: Next, Your Honor, I'd like to take up
7 PX 383. This one is a special one.

8 In this case, Your Honor, you're going to hear the
9 Hughes inventor by the name of Mr. Doug Dillon is -- is the
10 inventor, the true inventor under 102G of the claimed
11 invention.

12 Mr. Dillon in the course of his studies and work as a
13 Hughes engineer -- can we switch, please -- published a
14 technical report dealing with other work that he had done on
15 another Hughes product known as the DirecPC System. So
16 Mr. Dillon, along with some -- actually Hughes is listed solely
17 as the author here. If we look at the front, there are two
18 other co-authors. I believe it's a joint work.

19 It's not our argument here that this is hearsay
20 because Mr. Dillon is a Hughes employee, but we think that the
21 use of this as a secondary indicia article suggests to the jury
22 improperly that based on Mr. Dillon's other statements that
23 he's not an inventor of the claimed invention, and we believe
24 that that's an improper use of this material under secondary
25 indicia.

1 THE COURT: How is it an improper use? Are you
2 saying that that's not a relevant issue?

3 MR. BOWLING: Certainly the secondary indicia are
4 relevant; right? So if we talk about skepticism in the
5 industry or questions in the industry generally --

6 THE COURT: Is Mr. Dillon's role in the accused
7 device irrelevant? I'm trying to figure out what part of this
8 you're saying is improper.

9 MR. BOWLING: So the article as a whole is directed
10 to another product that Mr. Dillon worked on. Earlier in
11 time, Mr. Dillon had worked on an enterprise class product
12 that we contend is invalidating prior art and that this
13 discussion by him at his work on this other product suggests
14 to the jury that he is non-infecting inventor of the product
15 we will be talking about under not as a straightforward time,
16 but under the auspices of secondary indicia of
17 non-obviousness.

18 THE COURT: Well, you're saying that it has
19 relevance to another issue, which is whether Mr. Dillon was
20 the inventor of the accused system?

21 MR. BOWLING: I believe that the Plaintiff will use
22 it to suggest that Mr. Dillon was, in fact, not the inventor
23 or could not have been the inventor when he published work
24 like this.

25 THE COURT: And what I'm trying to figure out is

1 what's wrong with their use of it for that if that's a
2 relevant question?

3 MR. BOWLING: We simply believe that it's -- it is
4 improperly prejudicial, Your Honor.

5 THE COURT: I'm -- where -- I understand it's
6 prejudicial. I assume everything they're offering is
7 prejudicial. I'm trying to figure out why it's improperly or
8 unfairly prejudicial.

9 MR. BOWLING: There's a universe of publications
10 that they can draw on to show what the industry thought or how
11 the industry was skeptical, and the fact that they picked
12 Mr. Dillon specifically I believe goes beyond what they needed
13 to do to bolster their --

14 THE COURT: Well, what if they wanted to offer it
15 just to imply that Mr. Dillon is not the inventor like he says
16 he is?

17 MR. BOWLING: I don't believe I've seen it offered
18 for that purpose in this case as part of the expert report.
19 I've only seen it for the purpose of bolstering the secondary
20 indicia.

21 THE COURT: Well, what I'm struggling with is you're
22 suggesting that this document has another possible use, and
23 I'm trying to figure out why that other use is improper.

24 MR. BOWLING: My response to that, Your Honor, is
25 it's just simply based on prejudice. That's the strongest

1 argument I can make here.

2 THE COURT: Okay. All right. Well, I will overrule
3 the objection to Exhibit 383. What's next?

4 MR. BOWLING: Mr. Ponder will be back, Your Honor.

5 THE COURT: All right.

6 MR. PONDER: Good afternoon, Your Honor. Chris
7 Ponder.

8 The next bucket is the Anditel bucket. It's
9 around --

10 MR. HILL: I'm sorry, Mr. Ponder, to interrupt.
11 Your Honor, just for clarity as we move forward with
12 this, I know these need to be presented categorically. After
13 the Court has resolved the categorical question, I think,
14 anything that's not of like kind the parties have drawn out,
15 can we for the record assume that if a party does not present
16 something specific from that bucket once the Court makes a
17 ruling, that those issues are resolved as categorized by the
18 Defendant?

19 THE COURT: Mr. Ponder, what about that? I'm
20 understanding that that would be true or that we'll deal with
21 the rest of the bucket?

22 MR. PONDER: Well, Your Honor, we obtained a new
23 exhibit list last night that dropped a number of these
24 exhibits, so the objections are not withdrawn. I guess I'm
25 just trying to think what would be the most efficient way to

1 approach this because I don't think we should read in all the
2 ones that have been withdrawn. I think if the exhibits -- we
3 should specify which exhibits the objections are being
4 overruled, Your Honor, would be my suggestion.

5 THE COURT: So what you're telling me is that it's
6 your understanding that a lot of the exhibits that are on this
7 bucket list are no longer being offered by the Plaintiff?

8 MR. PONDER: About 200 exhibits were dropped last
9 night, and that's taken them from 590 down to 390, so
10 unfortunately, yes, I do think a lot of exhibits will be on
11 here that are withdrawn.

12 MR. HILL: Your Honor, I'm not -- I'm not trying to
13 use this to slip in things we've previously withdrawn after
14 the fact. If we withdrew it, we withdrew it. I'm just trying
15 to make sure for record purposes that we got a clear record
16 that everything in this bucket 382, 83, 89, 390, 391, 705,
17 those objections are now resolved.

18 THE COURT: Mr. Ponder, why shouldn't the
19 understanding be that those objections are overruled, or if
20 the exhibits have been withdrawn, they're obviously not coming
21 back in just because we didn't address the objection or it was
22 considered overruled, but is that fair to your side?

23 MR. PONDER: I think it's fair, Your Honor. If I'm
24 understanding correctly, if an objection -- if an exhibit
25 appears in a bucket and the Court -- and then it's not raised

1 with the Court and the Plaintiff hasn't withdrawn it before
2 today, then the objection is overruled.

3 THE COURT: I think that's a clear and logical way
4 to do it, and clearly if they have withdrawn the exhibit, they
5 don't get it back.

6 MR. HILL: Thank you, Your Honor.

7 MR. PONDER: Okay.

8 THE COURT: So what we just dealt with, for
9 instance, was the Elbert bucket, and those objections are
10 overruled. So now we can pick another bucket.

11 MR. PONDER: I'm -- in my shuffling here, I moved my
12 paper around. Let me go back to it. Your Honor, if we could
13 take up the discovery bucket next, it's page 12.

14 THE COURT: All right. My page 12 was the Elbert
15 bucket.

16 MR. PONDER: Page 11, Your Honor. Sorry.

17 THE COURT: Okay.

18 MR. PONDER: Okay. Of these exhibits, let's start
19 with PX 759, if we can get that up, please. Your Honor, this
20 is a discovery email from my colleague Mr. Bowling where -- if
21 we can highlight the third sentence starting with we note that
22 source code?

23 So our understanding is the reasons why this exhibit
24 is on their exhibit list is there -- is that Mr. Elbert or
25 Mr. Gooden relied on this statement in his report to say that

1 he looked at the source code corresponding to the HN/HX
2 products and that it was located in a directory called
3 Brighton. We're not challenging that the source code from that
4 path corresponds to the HN/HX products.

5 THE COURT: All right. Mr. Ponder, I -- my
6 presumption is that this shouldn't be admitted. Let me hear
7 if they can change that.

8 MR. FLYNN: Your Honor, just briefly, Patrick Flynn
9 for the Plaintiffs.

10 We discussed this with counsel for Hughes the other
11 day at the meet and confer. I'm a little surprised they're
12 raising it today. We agreed to not seek to admit this exhibit
13 unless and until this became an issue at trial.

14 This is something our expert relied on -- our source
15 code expert relied on in forming his opinions and confirming
16 that the source code in this directory was the right one.
17 Counsel for Hughes represented to us, just like as they did
18 today, that they don't intend to challenge this statement, and
19 we said we're not going to seek to admit it.

20 The only reason it's still on our list is if they do
21 back off that and seek to challenge it, because it's not a
22 stipulated fact or anything in the pretrial order, if they do
23 later come back and try to challenge it, we just left it on the
24 list with the objections and we're --

25 THE COURT: All right. Well, I'm going to show then

1 that 759 should be withdrawn from the list, but if this
2 becomes a disputed fact, then you can raise it with the Court,
3 but I don't expect it to based on Mr. Ponder's representation.

4 MR. PONDER: We'll note for the record we're
5 withdrawing our objections to PX 786 and PX 787, and my
6 understanding is PX 769 has been withdrawn, and with that,
7 that's --

8 MR. FLYNN: That's correct, Your Honor.

9 THE COURT: All right. Then we've accomplished that
10 bucket.

11 MR. PONDER: If we could move to the
12 misappropriation bucket, and that is page 43, Your Honor, if I
13 can get --

14 THE COURT: All right.

15 MR. PONDER: Actually can we get Exhibit PX 135
16 first, Mr. Aquino?

17 Your Honor, this is an email chain within Hughes, and
18 the reason why we're objecting to this is primarily on 403
19 grounds because it's being used to suggest that Hughes
20 improperly obtained access to an Elbit document.

21 If we could scroll to the last page? Go another
22 page. Okay. Page three, please. Page two, please. Page one.
23 Okay. Your Honor, so this -- this is an email chain that's
24 talking about a particular customer that had sent an attachment
25 to Hughes, and if -- if I could show you Mr. Elbert's report,

1 this is his rebuttal report at page 921, paragraph 921.

2 The problem is that Mr. Elbert in the body of his
3 report, he appears to be suggesting in paragraph 921 that this
4 document is evidence, right there, that an Anditel employee,
5 Mr. Navarro, immediately and without Elbert's authorization
6 shared Elbit's competitive analysis with a Hughes employee.

7 And so that's what these Exhibits 115 and 135 are.
8 135 is the email that Mr. Elbert intends to say shows that
9 Hughes obtained document 115 improperly. There is no trade
10 secret misappropriation claim here, Your Honor. These
11 documents are from 2014, well after any alleged infringement.
12 It's highly prejudicial to Hughes to have it suggested that in
13 the course of competition they obtained a confidential
14 document.

15 The real problem here, too, is there's no fact
16 support for this. There's no witness cited or anyone to
17 suggest that this was confidential information, and even if it
18 was confidential information and there was misappropriation,
19 that's not relevant to any patent issues here, Your Honor.

20 THE COURT: All right.

21 MR. PONDER: So we would ask for 115 and 135 be
22 excluded.

23 THE COURT: Thank you, Mr. Ponder. Let me hear the
24 response.

25 MR. FLYNN: Your Honor, again, I'm a little puzzled

1 why we're hearing argument on this document because we
2 discussed this on the meet and confer with counsel, and we
3 informed them that we do not intend to have our expert present
4 any sort of misappropriation argument to the jury.

5 THE COURT: Are you withdrawing the exhibits?

6 MR. FLYNN: No. We believe the exhibits are
7 relevant, and I believe counsel for Hughes indicated they
8 intended to address this in the next bucket as well.

9 There's a common customer between Shiron and Hughes
10 called Anditel -- or between Elbit and Hughes called Anditel,
11 and this email chain is a document between Anditel and Hughes
12 regarding competing for that contract and, you know, the sort
13 of back and forth, well, here's what Shiron is telling me, how
14 are you guys better, so we think it's relevant to just the
15 general competition between the parties.

16 THE COURT: And the general competition between the
17 parties is relevant how?

18 MR. SUDARSHAN: Your Honor, it also goes to the
19 Georgia Pacific factors and damages in the case to the extent
20 the parties are competing in the same market for the same
21 customers, and to the extent that there was enough -- enough
22 attention being paid to show Shiron/Elbit in the marketplace
23 by Hughes, that there was information being passed to Hughes'
24 marketers about what Elbit was up to.

25 We have testimony in this case from Hughes' employees

1 that they weren't monitoring Elbit or Shiron at all, that they
2 didn't even know about them, and so we think we're entitled to
3 confront those witnesses with evidence that Hughes did, indeed,
4 know about Shiron and Elbit.

5 THE COURT: So show me in the email Exhibit 135
6 where there is a relevant statement about that.

7 MR. SUDARSHAN: Can you switch to yours? So we have
8 a Hughes employee here Hugo Frega forwarding this to other
9 high level Hughes marketing executives discussing Francisco,
10 who is the customer contact at Anditel, shared Elbit
11 competitive analysis and sent direct directly to him and then
12 they're analyzing the main strengths of Hughes' -- of Hughes'
13 system. That's what we think the relevant -- the relevant
14 piece of this is, Your Honor.

15 We're not intending to suggest there's anything
16 improper about this. We understand this happens in competition
17 and in the marketplace that, you know, the customers comparison
18 shop and between different proposed vendors, so we're not
19 suggesting anything improper. We're just presenting this as
20 relevant to the competition between the parties in the -- in
21 the Georgia Pacific factors.

22 THE COURT: How does the fact that the competitive
23 analysis was shared relate to that, that that particular
24 document was sent?

25 MR. SUDARSHAN: Your Honor, there's a -- there's a

1 willfulness claim in this case, and we believe there's a
2 variety of facts that we are going to put together in our case
3 that go to willfulness.

4 One of them is, of course, knowledge of the patents,
5 but kind of continued knowledge of what Elbit and Shiron were
6 doing in the marketplace after that knowledge of the patent we
7 think is certainly relevant to our willfulness claim.

8 THE COURT: I mean, why can't you accomplish what
9 you're saying you need by having the rest of this email, but
10 without the part about sharing the competitive analysis
11 document?

12 MR. SUDARSHAN: I think -- I think the problem with
13 that, Your Honor, is because the fact that the competitive
14 analysis was being shared goes to the very -- the very notion
15 that Elbit mattered as a company and Elbit and Shiron
16 technology mattered.

17 We believe they're going to put on a case that
18 they're the only innovator in this space and that we've had
19 many of their employees say under oath that they never heard of
20 us, and so we think this goes to that narrative, and we ought
21 to be able to put on evidence from their files where they were
22 very actively monitoring Elbit and Shiron in the marketplace as
23 of relatively recently.

24 And if you take that fact out, that it was -- it was
25 one of the customers -- a common customer, then I think its

1 relevance goes away. The fact that it's a common customer that
2 both of them were vying for shows that Elbit and Shiron
3 actually had technology that was relevant.

4 THE COURT: All right.

5 MR. PONDER: Your Honor, I want to correct a few
6 misstatements here.

7 First of all, I don't think the testimony was that no
8 one ever looked at or knew about Shiron. I think the answer is
9 Shiron is a company that I think in its heyday had maybe 2 to
10 3 percent, so I think the issue is they just weren't very
11 relevant. But we -- we think that, you know, a competitive
12 analysis in 2014, which is less than a few months before the
13 filing of this lawsuit, is -- is not very relevant towards the
14 willfulness issue.

15 Here, this is being offered to suggest that there was
16 a trade secret misappropriation, and I'd like to show you one
17 of the many other documents that they are trying to put on
18 about Anditel that do not have this aspect that makes the
19 point, for example, Your Honor.

20 If we can take a look at PX 140, which is in the
21 Anditel bucket, Your Honor. This is another contemporaneous --
22 this is from 2013 talking about how Anditel is competing with
23 Hughes and Shiron. They have it on their exhibit list. It
24 does not have the tinge of a trade secret misappropriation,
25 Your Honor.

1 THE COURT: You know, Mr. Ponder, it seems to me
2 that the problem with this originates from that expert's use
3 of that document to argue that Hughes had engaged in wrongful
4 behavior.

5 Why wouldn't that be adequately addressed if the
6 Court enters an in limine ruling now that directs the Plaintiff
7 not to make any such argument without seeking leave and --
8 because I -- I believe that the document, this email and the
9 competitive analysis, has some relevance. I think it's just
10 the possible misuse of it that would be problematic.

11 MR. PONDER: Your Honor, if I'm understanding the
12 suggestion what the limine ruling would be, it would be -- I
13 think if it was a ruling precluding Elbit from suggesting or
14 implying that Hughes obtained confidential information.

15 THE COURT: Well, that this particular document was,
16 that there was anything wrongful about the sharing of that
17 competitive analysis document.

18 MR. PONDER: I think that would be fine, Your Honor.
19 Actually, if we can see the -- the email where it said it was
20 shared? I believe that was 135.

21 Yes, Your Honor, we would just ask that it be noted
22 that the preliminary ruling precludes the introduction of the
23 paragraph 921 of Mr. Elbert's report.

24 THE COURT: All right. Let me hear the response to
25 that.

1 MR. SUDARSHAN: Your Honor, we're fine with that
2 limitation. Our expert will not address this in his testimony
3 and try to link this to a misappropriation.

4 THE COURT: All right. So the in limine ruling will
5 be that the expert not provide testimony in accordance with
6 paragraph 921 of his report and that the Plaintiff not argue
7 that there was anything wrongful about the sharing of that
8 competitive analysis document and that --

9 MR. PONDER: If I can just clarify, it's the Elbert
10 rebuttal report, Your Honor, not his opening report, just to
11 have the paragraph number correct.

12 THE COURT: All right. So ordered. What's next?

13 MR. PONDER: If we can go back to the Anditel
14 bucket, Your Honor, which was page six.

15 THE COURT: All right.

16 MR. PONDER: With respect to PX 140, we think this
17 document is -- scroll down to the bottom of page one. We'll
18 withdraw our objection, Your Honor, to 140.

19 THE COURT: Okay.

20 MR. PONDER: We'll withdraw our objection to 155 and
21 260, Your Honor, and I understand that the remainder of those
22 exhibits have been withdrawn.

23 MS. FAIR: That's correct.

24 THE COURT: Very good. Thank you.

25 MR. PONDER: For the next bucket, I'd like to go to

1 the Raven Video bucket, Your Honor.

2 THE COURT: And that's on what page?

3 MR. PONDER: That is page 46. It's -- there's three
4 exhibits in that bucket, Your Honor, and this relates to
5 Mr. Raven. He is a Hughes employee, and in his personal time,
6 he gave a presentation. I believe his deposition testimony
7 established -- his deposition in this case established that he
8 gave a presentation on satellite cellular backhaul
9 technologies for a company called Explorer Gate that's
10 affiliated with his wife.

11 This is not something he did in connection with his
12 employment, so we think it should not allowed to be introduced
13 into evidence here as admissions against Hughes, so the
14 objections we are standing on, Your Honor, are the 802
15 objection and the 403 objections, Your Honor.

16 THE COURT: Well, I understand the hearsay
17 objection. Is there some unfair prejudice that you want to
18 explain on 403 or is it just that he wasn't -- he didn't say
19 this in his capacity as an agent and, therefore, it's hearsay?

20 MR. PONDER: Your Honor, what I believe that they're
21 trying to use it is to introduce the operations of cellular
22 backhaul, and one of the key issues in this case is, you know,
23 what you do with the non-data carrying time slots.

24 I believe his general description of this technology
25 is being used to suggest that the Hughes products operate in

1 that manner; and, therefore, it's prejudicial when we have
2 evidence here, we have the source code, we have witnesses being
3 asked questions exactly how the Hughes product works, as well
4 as how it works with the third party supplier components that
5 supply important functionality, how those products operate.

6 And so generic testimony by someone who is not
7 operating in his agency capacity shouldn't be introduced as a
8 way to suggest that that is how Hughes's products operate.

9 THE COURT: All right. Thank you, Mr. Ponder.

10 MR. FU: Good afternoon, Your Honor. I'm Yale Fu
11 for the Plaintiffs.

12 THE COURT: Mr. Fu.

13 MR. FU: So our response to the fact that there is a
14 hearsay issue is that during the deposition of Mr. Raven, who
15 is an executive of Hughes, he testified that -- or he had an
16 opportunity to respond about whether he believed the video was
17 true and whether he had any disagreements with it.

18 So we believe that, you know, he as an executive of
19 Hughes and having manifested his belief that the video was
20 accurate and true would resolve the hearsay issue.

21 THE COURT: So you're contending that this is an
22 adopted admission?

23 MR. HILL: Your Honor, I believe what we're
24 contending is this is an opposing party statement. If you
25 look at 801D2D specifically, the statement is offered against

1 an opposing party and was made by the party's agent or
2 employee, no dispute about that, on a matter within the scope
3 of that relationship. This statement concerns a matter within
4 the scope of his relationship with Hughes.

5 It doesn't have to be in the course and scope of his
6 employment. It only has to be on a matter within the scope of
7 that relationship and while it existed, and there's no question
8 he was an employee at the time the statement was made as
9 executive vice president.

10 THE COURT: Well, the scope of his agency with
11 Hughes would be Hughes' business. Do you contend that this
12 relates to the business of Hughes?

13 MR. SUDARSHAN: We do, Your Honor, for a couple of
14 reasons. Just for some more context here, Mr. Raven is a very
15 well-known figure in the world of satellite communications.
16 He's one of Hughes' main marketing faces. So when he speaks,
17 it's our belief that he represents Hughes.

18 We also asked him in his deposition, did you get
19 Hughes' approval before making those videos, and he said, I
20 advised Ramesh that I was making some videos. Now, he said
21 he -- that he didn't show the script to Ramesh -- Ramesh is the
22 head of the international division for Hughes, but he did say
23 he advised Mr. Ramaswamy, who is the lead of the international
24 division, that he was making the videos, so that's one point.

25 The other point, Your Honor, is from a technological

1 standpoint. What's being described in this video is a very
2 general explanation of how generally cellular backhaul
3 technology works, and so there -- we think it's certainly fair
4 to -- for our expert and for that evidence to make it to the
5 jury because it's our claim that the -- that the '874 patent in
6 this case is a very early technology for satellite and cellular
7 backhaul.

8 So to the extent that Hughes is describing this
9 technology very generally and it is consist with how we think
10 the accused products work as well, we think that's certainly
11 fair game.

12 THE COURT: All right. Mr. Ponder, is there any
13 dispute that satellite cellular backhaul is something that
14 would be within the scope of Mr. Raven's employment?

15 MR. PONDER: Mr. Raven works on Hughes -- the sales
16 and marketing of Hughes' BStat products that can be used for
17 Hughes' satellite backhaul technology. It's not within his
18 scope to describe cellular backhaul technology generally.

19 And I didn't hear that they said that Mr. Raven was
20 talking about how Hughes' products operated. They said it's
21 background, which sounds like they're offering him as kind of a
22 lay expert witness to explain the technology in general.

23 He -- he had to get permission because he realized it
24 wasn't part of his work, and it sounds like he was concerned
25 that it was some kind of improper moonlighting, so I think that

1 tells you that he didn't think that he -- he goes and gets
2 presentations on satellite cellular backhaul technology, and
3 doing it for this other company not related to Hughes clearly
4 is with inside the scope.

5 And we haven't heard anything that establishes that
6 what his work was in this unrelated entity had to do with
7 describing accurately how cellular technology -- cellular
8 backhaul technology works with respect to Hughes, Your Honor,
9 so that's why I think it's prejudicial. We have experts here
10 on both sides. They're going to explain the background, the
11 technology, as well as the inventor.

12 THE COURT: I can understand it could be
13 prejudicial, but I don't think it's unfairly so if your own
14 employee makes statements, and I think that -- I understand
15 the issue that these were not statements that he was being
16 paid by Hughes to make, but it does seem to me that they
17 relate to the work that he does with Hughes, and that's what
18 makes it an admission. It's there.

19 Then you have the ability, because you control him,
20 to call him and have him explain the statements if they need
21 explanation, but I -- I'm satisfied that they fall within the
22 provision of Rule 801, so I'll overrule that objection.

23 Is there anything else in that bucket?

24 MR. PONDER: No, that completes that bucket, Your
25 Honor.

1 THE COURT: All right. I tell you what, while you
2 select the next bucket, we're going to take the afternoon
3 recess and we'll come back and resume. Thank you.

4 COURT SECURITY OFFICER: All rise.

5 (Recess taken.)

6 COURT SECURITY OFFICER: All rise.

7 THE COURT: Good afternoon. Please be seated.

8 Mr. Ponder, what bucket are we on?

9 MR. PONDER: Your Honor, before we do that, if we
10 can read in some agreements?

11 THE COURT: All right. Go ahead.

12 MR. PONDER: Plaintiffs are withdrawing their
13 objection to the Feldman prior art reference, and Hughes will
14 withdraw the Quick and Kou references.

15 We will, of course, file something, Your Honor, with
16 these numbers. We're just putting the agreement in the record.
17 I don't know if Plaintiffs want to affirm that.

18 MR. LEE: Affirm, Your Honor.

19 THE COURT: All right.

20 MR. PONDER: Second, the parties have reached a
21 stipulation on a number of exhibits that will be pre-admitted.
22 The agreement is recorded in Mr. Fu's email sent on July 19th
23 at 8:12 p.m. We will turn that into a list of exhibits by
24 exhibit number for filing with the Court, Your Honor.

25 THE COURT: All right. Is that correct?

1 MR. HILL: Yes, Your Honor.

2 THE COURT: All right.

3 MR. PONDER: Your Honor, if we turn to the Martinez
4 bucket, it is page -- I believe it's 41, Your Honor.

5 THE COURT: Very good. I'm there.

6 MR. PONDER: So, Your Honor, these documents are
7 hearsay documents. Appear to be all documents that Elbit's
8 damages expert Mr. Martinez relies upon, so we're not
9 objecting to his reliance on them. We just think that these
10 articles are -- you know, they're hearsay. They don't have
11 any place in being admitted.

12 MR. HILL: Your Honor, we withdraw all of these
13 items.

14 THE COURT: Very good. The Martinez Hearsay bucket,
15 the exhibits are withdrawn.

16 MR. PONDER: Apologies, Your Honor, but I didn't
17 have that noted.

18 If we can turn next to the Hughes Financial bucket,
19 that is on page 30. Of the exhibits in here, Plaintiff has
20 withdrawn 121. With respect to the ones that are called --
21 let's start with the Hughes BCR financial reports, if you could
22 bring up PX 91.

23 Our objection to these, Your Honor, is that they are
24 essentially the company's financial records or financial
25 reports. They show rating numbers, service numbers for

1 multiple lines of business, including lines of business that
2 are not accused of infringement.

3 For example, the Enterprise bucket includes not only
4 sales and writing new information for accused products, it also
5 includes for non-accused services, such as terrestrial internet
6 access and consulting services, Your Honor.

7 We understand Mr. Martinez relies on them in
8 various -- various manners, but, you know, we think introducing
9 this kind of -- publishing this information to the jury is
10 highly prejudicial. We would note that neither experts'
11 damages opinions turn on any kind of profitability analysis,
12 specific numbers.

13 The royalties are based upon a per unit royalty
14 that's based upon allegedly comparable licenses, Your Honor, so
15 we don't think Hughes' total revenues are permissible, and we'd
16 ask for the BCR financial reports to be excluded as violating
17 the entire market value role.

18 THE COURT: So help me understand what this
19 demonstrates. You're saying that these numbers, for instance,
20 the service sales are for the company for Hughes' entire
21 service revenue?

22 MR. PONDER: So, for example, this one that we're
23 looking at, BCR stands for business center review, and this
24 one is the North America Financial Analysis, and you see that
25 there's multiple different buckets here.

1 We have a service for enterprise, and that includes
2 more than just services for enterprise. An example is the
3 terrestrial communication services that Hughes provides. For
4 example, if you're a large company and you have a lot of
5 facilities, you contract with Hughes, and Hughes handles
6 getting you a cable modem, a DSL modem, all technologies that
7 are not implicated here, and they manage it for you as a
8 service, so they basically are your one-stop shop, Your Honor.

9 So these are not tied to the specific accused
10 products, although accused revenue would be included in here,
11 and, again, if we can keep going --

12 THE COURT: Well, that's good enough. That gives me
13 an idea, and I'll -- let me hear the response. I'll give you
14 a chance to reply.

15 MS. FAIR: Good afternoon, Your Honor. On these
16 documents, as Mr. Ponder talked about, our -- our expert --
17 these are consolidated financials, so there is information in
18 here that's not used by our damages expert, but he does use
19 information from these spreadsheets in coming up with his
20 reasonable royalty analysis, and so --

21 THE COURT: Why does he need to show these to the
22 jury then?

23 MS. FAIR: Your Honor, I don't know which specific
24 portion -- these are pretty big documents. I don't know which
25 specific portion is intended to be shown to the jury other

1 than what he actually uses.

2 And so this isn't an issue where we're going to be
3 flashing up revenues and -- and entire market value rule
4 concerns in front of the jury as part of his demonstrative or
5 focusing on that in front of the jury.

6 And so the fact that a consolidated financial has
7 additional information that is not considered by the damages
8 expert, but also has information that is considered by him,
9 doesn't warrant exclusion of the entire document, nor --

10 THE COURT: It doesn't warrant introduction of the
11 entire document, and if it's got a lot of irrelevant financial
12 information that has a bunch of big numbers, I don't see why
13 it should be shown to the jury.

14 I mean, your expert can rely upon the contexts of
15 these, and if Hughes questions his source, said, you know, this
16 number is wrong, then I think, fine, and that would open the
17 door to your using this if this is the source of the number,
18 but I don't think that there's a good reason to put all of
19 Hughes' financial documents into evidence in front of the jury.

20 MS. FAIR: And, Your Honor, I think this just goes
21 to the BCR reports, which is where the revenue information is.
22 The other documents that are in this category are closer tied
23 to unit sales and information that's not as inflammatory, I
24 guess I would say, and doesn't raise the entire market value
25 rule concerns that we're hearing right now.

1 THE COURT: Well, what I'm going to do then is I'm
2 sustaining the objection to the BCR reports, which are
3 Exhibits 91 through 98, and I'll hear the objection to the
4 other documents in that bucket.

5 MR. HILL: And, Your Honor, if I can just maybe help
6 us with some of this as we work through it, part of this --
7 the reason for these, these are underlying financial documents
8 that support the expert's opinions.

9 The expert has summarized most of these documents and
10 schedules to his report, the portions of them that he uses.
11 There's some been back and forth between the parties -- we
12 haven't gotten to them yet -- to agreeing 1006 summaries, using
13 those -- those summary things that -- the schedules at the end
14 of the report as 1006 summaries, so that they would be actually
15 in evidence.

16 Assuming the parties can work through that, that may
17 eliminate the need for any of these documents, so I'll just
18 point that out so that the Court has a little better context of
19 why this stuff is still in play.

20 THE COURT: Well, Mr. Ponder, I think what I'm
21 hearing is a suggestion perhaps that we carry the rest of this
22 bucket until later in the proceeding to see if -- because I
23 don't think we're going to finish this afternoon, so we'll be
24 back here. Do you think that that's a helpful suggestion?

25 MR. PONDER: Your Honor, I think that may be helpful

1 for some of these BCRs, Your Honor, but there are a few I
2 think we can go ahead and handle, for example, the 10K filing
3 and annual reports.

4 THE COURT: Okay. Well, let's go ahead and turn to
5 them, but before -- actually before we move on to that, I see
6 that there are other exhibits in this bucket that are also
7 BCR, such as 258, 284, 286.

8 MR. PONDER: Your Honor, I can read them in. I
9 might be able to do it quicker.

10 THE COURT: Okay.

11 MR. PONDER: it's 284, 285, 286, 288, and, Your
12 Honor, --

13 THE COURT: What about 258? I mentioned that one,
14 but you didn't.

15 MR. PONDER: Sorry, Your Honor. I was picking up
16 after -- after you had gotten that far, so, yes, 258 as well.

17 THE COURT: All right. Then that's fine. Those are
18 included in the BCR ruling, so if you want to take up 265, the
19 10K now, I'll be happy to take that up. Let me hear from the
20 Plaintiff on that.

21 I'll tell you that I have typically ruled over the
22 years that 10K documents should not be admitted because of all
23 of the irrelevant and potentially prejudicial information they
24 have, but if you have a paragraph or a page or whatever out of
25 it that your expert needs, then let's focus on that.

1 MS. FAIR: Your Honor, we're withdrawing that one.

2 THE COURT: All right. Thank you, Ms. Fair.

3 MS. FAIR: Your Honor, I'm being informed that I
4 think there's been a misunderstanding on a couple of these
5 exhibits. 284, 285, 286, and 288 are not the large
6 spreadsheets that we saw with Exhibits 91, 92, 93 that we
7 looked at earlier.

8 They're actually documents that contain competitive
9 analysis information about Hughes tracking Shiron, which is
10 something we discussed earlier in the hearing.

11 THE COURT: All right. Well, then let's take a look
12 at those and get a ruling on them. Any of the exhibits that
13 have the business center review in the name of them that you
14 do want to use, show me.

15 MR. PONDER: If I can ask, was the first one you
16 wanted to raise 284?

17 MR. FLYNN: Yes.

18 MR. PONDER: So, Your Honor, I think the difference
19 with these ones is a BCR is what is called a -- business
20 center review is a periodic management reporting thing, so we
21 saw -- the earlier versions we saw were strictly the
22 spreadsheet, and this looks like the cover slides. If we can
23 look at -- but they -- they typically have these kind of
24 summaries.

25 If we can turn to page -- it's the fifth page, if we

1 can rotate that. It has total revenue numbers here, and
2 actually this one is also publishing third party Comsys
3 marketing reports, which we think can be problematic, Your
4 Honor.

5 But starting on page 15 is the income statement for
6 the entire business.

7 THE COURT: All right.

8 MR. PONDER: Oh, I'm sorry. Thirteen, Your Honor,
9 page 13. I misspoke.

10 So we -- we think the financial statement income
11 statements should come out of all of these types of things. I
12 think this is the same issue we have for the other BCRs is we
13 think the financial statements should come out and total
14 revenue numbers, if they're summarized in the cover slides.

15 If it's a -- like a periodic activity report, you
16 know, where it says we're working on this project, we're
17 working on that project, that's not the focus of the objection
18 here. The focus of the objection is these income statements,
19 these here's our revenue in this division type of things, Your
20 Honor.

21 THE COURT: All right. Thank you, Mr. Ponder.

22 MS. FAIR: We might be able to resolve this, Your
23 Honor. The page we're interested in is obviously not this
24 income statement. It's, I believe, page three of the exhibit.

25 THE COURT: Well, then you should restrict your

1 exhibits to the part that you're interested in. I think
2 that's a good rule generally.

3 MR. PONDER: Your Honor, may I perhaps suggest
4 something to short circuit this a bit?

5 THE COURT: You may.

6 MR. PONDER: I would perhaps suggest that the
7 Plaintiff propose redacted versions, send them over this
8 afternoon, and we can agree on them. I think, you know, that
9 will eliminate a lot of these problem for these business
10 center reviews, Your Honor.

11 THE COURT: All right. And perhaps that would be
12 appropriate for the rest of this bucket as well.

13 Ms. Fair, if you can just meet and confer with Mr.
14 Ponder or whoever on the Defendant's side and show the parts
15 that you want in, and if they're not the parts they object to,
16 then that sounds like we would have a solution.

17 MS. FAIR: Yes, Your Honor.

18 THE COURT: Okay. Then we'll carry the rest of this
19 bucket until tomorrow.

20 MR. PONDER: Your Honor, if we could move to
21 bucket -- let me see here. If we can take up the Rog Response
22 bucket, this is on page 47.

23 Our objection to these three exhibits is they're --
24 one, they're particular responses to interrogatories, what
25 we've -- what we've proposed and what we've disclosed with

1 respect to as having exhibits for interrogatories.

2 We think that what should go on the exhibit list and
3 be available at trial would be the most recent response with
4 all the prior responses in a single exhibit with the objections
5 redacted.

6 So the problem with these is we haven't received
7 redacted versions of these where general objections, specific
8 objections have been removed, and these are earlier responses
9 that don't include the later response.

10 We're not saying that a party can't use the earlier
11 response and point out the differences, but we think that if
12 you're going to use the interrogatory as an exhibit at trial,
13 it should be -- what we propose is that the exhibits be just
14 the pages for each interrogatory with all the responses.

15 So that, for example, there's a Exhibit 751, for
16 example, would be all of Hughes's responses to interrogatory
17 number one, in one exhibit with the objections redacted, Your
18 Honor.

19 THE COURT: All right.

20 MS. FAIR: We've agreed to this already, Your Honor.

21 THE COURT: Very good. I'll put that the objections
22 to the Rog Response bucket are overruled subject to the
23 agreement that has been reached.

24 MR. PONDER: If we could turn to the Hughes' Price
25 bucket, and that is page 34, Your Honor.

1 THE COURT: Okay.

2 MR. PONDER: I believe Exhibit 802 has been
3 withdrawn, so the only exhibit remaining is PX 294, if we can
4 have that. Okay. We don't have it. It's an aide document.

5 What this document is, Your Honor, it's a
6 spreadsheet. It's the raw sales data of -- of Hughes'
7 products. It's the total revenue. There we go.

8 These are raw sales transactions. I mean, they're
9 voluminous native documents -- we're not really sure how these
10 would even be able to go back to the jury -- where it has the
11 full order detail for customer orders, including every
12 component that was sold to them that relates to Hughes products
13 and includes the entire pricing, if we can scroll towards the
14 right and find the revenue numbers.

15 So it has the shipment -- shipment amounts for some
16 products, for example, \$70,000 for one -- for one good. We
17 don't think because the entire market value has not been
18 satisfied here that the entire value of hardware being sold to
19 Hughes should be put in evidence.

20 Now, if the reason why this is here, Your Honor, is
21 that they want to establish the quantities of products sold,
22 Your Honor, we would point out that we originally produced all
23 of these documents. These were all sales data numbers and
24 included them as a Rule 33D response.

25 And the Court granted a motion to compel ordering

1 Hughes to provide a summary that gave on a product-by-product
2 basis an exact accounting in units by year. We told the Court
3 that was very laborious for us. We lost on that, but we spent
4 a lot of money and a lot of time to put the quantity sold in an
5 interrogatory response that is a table that's easier to
6 understand, does not have specific customer numbers, and
7 doesn't have the entire sales prices for the equipment sold on
8 them.

9 So, Your Honor, we would ask that that be allowed in
10 as opposed to raw sales data that includes revenue not related
11 to the infringing feature and not apportioned to the infringing
12 feature.

13 THE COURT: All right. What's the response?

14 MR. LEE: Your Honor, we're not intending to put the
15 spreadsheet in front of the jury, but these are, again,
16 underlying -- this is underlying information that Mr. Martinez
17 uses in his report, and we want it for the record, not for
18 showing total revenues, and, in fact, --

19 THE COURT: I don't know what you mean you want it
20 for the record. The record is what the jury sees and relies
21 on in deciding the case.

22 MR. LEE: Yes. What I meant was that we don't plan
23 on calling attention to this document, but subject to any --
24 reaching some kind of agreement on schedules coming in or some
25 compilation of summaries coming in, this is what we -- this is

1 the evidence that we have of the -- the sales.

2 And I don't -- I don't know right now whether the
3 interrogatory response that Mr. Ponder mentioned would have the
4 same information, but we could certainly look into that.

5 THE COURT: What --

6 MR. LEE: I don't know right now whether the
7 interrogatory response that Mr. Ponder was referring to would
8 give us the same information, but we can certainly look into
9 it.

10 THE COURT: What use do you plan to make of this
11 document during the trial?

12 MR. LEE: We don't plan to put it in front of the
13 jury, but Mr. Martinez relies on the information here to come
14 up with figures for Hughes sales.

15 THE COURT: Exhibits are documents that are to be
16 put before the jury, so you're not planning to use this as an
17 exhibit, I'm taking it?

18 MR. LEE: That -- that's right, Your Honor, we're
19 not.

20 THE COURT: All right. Then I'll sustain the
21 objection to it, and if you need to use it for some reason to
22 impeach or to rebut an argument raised on cross-examination,
23 you can seek leave to do so, but I'll sustain the objection to
24 294 at this time.

25 MR. LEE: Thank you, Your Honor.

1 MR. PONDER: At this time I'm going to turn it over
2 to Mr. Bowling for the next set of objections.

3 THE COURT: All right.

4 MR. BOWLING: Your Honor, I'd like to address the
5 Hughes-Cellular bucket on page 25 of the document. I'm
6 informed it's actually at page 24. I have an earlier copy.

7 THE COURT: All right. And this is which of the two
8 buckets on page 24?

9 MR. BOWLING: Hughes-Cellular.

10 THE COURT: Cellular Backhaul. Okay. I have that.

11 MR. BOWLING: And I'll note that Exhibits 126, 268,
12 277, and 283 were withdrawn earlier today.

13 MR. LEE: Your Honor, I have -- I have a correction
14 if I can make it now. I think 283 was not withdrawn, but 169
15 was withdrawn.

16 THE COURT: I don't see 169 on the list.

17 MR. BOWLING: Do you mean 196? I think 283 has not
18 been withdrawn.

19 THE COURT: Well, why don't you tell me the ones
20 that are objected to.

21 MR. BOWLING: The sole remaining objection will be
22 to 195, Your Honor.

23 THE COURT: All right.

24 MR. BOWLING: If we pull this up, so this is a
25 presentation to a company named Zain, Your Honor, for the

1 Hughes Cellular Backhaul Solution, if we can go to page two.

2 The proposed -- Your Honor, we discussed the '874
3 patent for the cellular backhaul. The claim is to a -- to a
4 system. The entire proposal here is for an extra territorial
5 installation in the Middle East, Middle Eastern and African
6 countries.

7 THE COURT: So is this a relevance objection?

8 MR. BOWLING: It's both relevance -- it is
9 relevance, Your Honor. It also goes to prejudicial in that
10 it's showing large numbers of overseas sales influencing --
11 potentially influencing the jury to think that this is a very
12 successful product in the United States where infringement
13 would be relevant, Your Honor.

14 THE COURT: All right. Let me hear what the
15 relevance is, and I'll give you a chance to respond.

16 MR. SUDARSHAN: Your Honor, relevance is that the --
17 the products are undisputedly manufactured in the United
18 States, and we have a claim in this case that there is induced
19 infringement based on export of components that are intended
20 for an infringing use overseas.

21 THE COURT: All right.

22 MR. BOWLING: I'll address those in order. First of
23 all, the system is only complete when the hardware named in
24 the claim is hooked up to a cellular -- cellular circuit, so
25 we do dispute that the system was made in the United States.

1 THE COURT: Isn't that a dispute then for the jury?

2 MR. BOWLING: I don't believe that there's any
3 allegation that it is hooked up to a cellular network in the
4 United States, Your Honor. With respect to export 271F,
5 that --

6 THE COURT: Whether or not that's what it takes to
7 be infringing is the issue; right?

8 MR. BOWLING: Whether it meets the claim is. I've
9 not seen any evidence that we manufacture it in a way that
10 it's hooked up to a cellular network, though. There is simply
11 no evidence of that in the case.

12 THE COURT: All right. I'm just trying to see what
13 is your response to the relevance argument that Mr. Sudarshan
14 made?

15 MR. BOWLING: So actually starting with the second,
16 with respect to export, 271F has not been pled in this case.
17 We do not believe that a claim under 271F can go forward.

18 With respect to manufacture in the United States, we
19 don't believe there's any evidence of that, and that the
20 purpose of showing extra territorial installations would be
21 prejudicial to the jury, who should only be judging actual
22 infringing acts in the United States.

23 THE COURT: They are arguing that this is relevant
24 to their claim of induced infringement?

25 MR. BOWLING: There is no such claim. The induced

1 claim is under 271F, if I understand correctly, which was not
2 pled. There's no alleged induced infringement in the United
3 States.

4 THE COURT: All right? Mr. Sudarshan?

5 MR. SUDARSHAN: Your Honor, there is expert
6 testimony and fact testimony about testing of these systems in
7 the United States where the parts were all hooked up and
8 connected to a system that was live.

9 Now, Dr. Wicker in his deposition said he did not
10 believe that that qualified for the claims, didn't qualify as a
11 live cellular network, but that's -- that's -- as the Court
12 said, that's a fact dispute between the parties.

13 And we do -- we have reserved a 281F claim in the
14 case. I'm prepared to walk the Court through that if the Court
15 finds that would be helpful, but we have -- we have indirect
16 infringement allegations in our complaint that lay out all the
17 factual allegations underlying 271F.

18 I think to be -- just to be candid for the record,
19 Your Honor, the words 271F do not appear in the complaint.
20 Mr. Bowling is correct about that, but we have pled indirect
21 infringement. We disclosed a theory of 271F in Mr. Elbert's
22 opening infringement report, and Dr. Wicker acknowledged in his
23 deposition that he considered that opinion in responding to
24 Mr. Elbit's report.

25 So to the more clear, our complaint at docket 53

1 alleges, number one, that Hughes makes components of the
2 infringing system in the United States. That's paragraph 63.
3 Paragraph 65, the complaint alleges that Hughes knowingly sells
4 them to customers.

5 Paragraph 66, we allege that the customers are
6 actively encouraged to infringe using Hughes components, and
7 the customers are not limited to customers in the United
8 States. It's broadly Hughes customers, and we'll cite to the
9 Court a Fifth Circuit case Hamachi versus Conversion Services
10 holding that a pleading is sufficient if it states a claim,
11 even if it fails to categorize correctly the legal theory
12 giving rise to the claim.

13 So we did not say the words 271F, but we have laid
14 out an indirect -- we certainly have mentioned induced
15 infringement. We've laid out all the factual allegations in
16 the complaint, and I'll note -- Mr. Flynn, could you bring up
17 the fourth slide?

18 This Mr. Elbert's expert report at paragraph 733, his
19 February 13th report, that lays out exactly the allegations
20 of -- of induced infringement based on export of parts for
21 infringing combination overseas.

22 Mr. Elbert opined that -- he looked at the record and
23 opined that he was surprised these products were used in
24 overseas deployments and also pointed to numerous internal
25 marketing documents relating to cellular backhaul applications

1 that in his view showed that Hughes was actively inducing
2 infringement of the claim cellular telephone network in the
3 overseas backhaul.

4 And on the next slide, Dr. Wicker confirmed that
5 counsel for the Defendants had advised him about the 271F
6 theory in the case and he also considered that in forming his
7 rebuttal opinions.

8 THE COURT: All right. Thank you, Mr. Sudarshan.

9 Mr. Bowling, my thought on this is that the Plaintiff
10 has articulated relevance. Whether or not it's a viable claim
11 I think is a different matter that we don't have to decide on
12 an objection to the exhibits, but I'll overrule the relevance
13 objections.

14 What else do we have?

15 MR. BOWLING: That's all for this bucket, Your
16 Honor.

17 THE COURT: All right.

18 MR. DHANANI: Good afternoon, Your Honor. Ali
19 Dhanani.

20 THE COURT: Good afternoon, Mr. Dhanani.

21 MR. DHANANI: I'll turn Your Honor to page 13, and
22 there's two sections on page 13 that concern Elbit business
23 presentation and Elbit general, and those are the two buckets
24 that I'll start with.

25 The easy one first. We'll withdraw the one on Elbit

1 business presentation 464; and on PX 573, going down to the
2 general bucket there, the objection there is that the Elbit
3 company profile is from 2016. That's, one, after the lawsuit
4 was filed; two, basically after Elbit admittedly had sold off
5 the underlying Shiron assets.

6 And there's also discussion, for example, if you
7 could -- could you please switch the production? If you look,
8 for example, at page 44 of this company profile for Elbit
9 Systems, it also contains references, if you could blow up the
10 SOTM antennas.

11 It contains references to satellite systems that
12 Elbit provides that have nothing to do with the case, and
13 Elbit's attorneys have represented on the record that the SOTM
14 satellite on the move do not cover any technology or have any
15 relationship to the '073 or '874 patents in this lawsuit. That
16 was during the course of a deposition of Ms. Rospsha.

17 So there's nothing in this document from 2016 that
18 has relevance to the case for the '073 and '874 patents. It
19 concerns Elbit, and it is also prejudicial to the extent that
20 it identifies quite a bit of technology that Elbit does. For
21 example, if you go to page --

22 THE COURT: All right. Mr. Dhanani, let me hear the
23 response.

24 This is Elbit's marketing document?

25 MR. HILL: Your Honor, this is an Elbit business

1 description document. It's a business record. It's a
2 document made in the ordinary course. We'll have a sponsoring
3 Elbit witness who can describe it and what it is. It
4 describes who Elbit is, what it is.

5 We'll entitled to introduce our company, our client,
6 explain to the jury who we are and what we do. There's nothing
7 inflammatory about it. There's no 403 issue.

8 THE COURT: This is not -- how is this a business
9 record?

10 MR. HILL: Your Honor, it is a document that Elbit
11 creates in the ordinary course of its business based on
12 information that's available and known by those people who
13 created Elbit. I mean, it's a description of their business.

14 THE COURT: And how is it relied upon in the course
15 of the business? I mean, this is -- this is a marketing
16 brochure.

17 MR. HILL: Your Honor, it is -- it is a marketing
18 document. There's no doubt. It's how we communicate to the
19 world, to customers what we do, what our business is.

20 THE COURT: And you can communicate to the jury
21 through a witness.

22 MR. HILL: And that's what this was going to
23 accompany, Your Honor. We were going to put on a witness who
24 will testify about Elbit, the technologies that it's involved
25 in. It's kind of a who we are story, and so for that purpose,

1 Your Honor, it's -- we think it does qualify as a -- as a
2 record of their business.

3 It's a -- it's, you know, documenting what they do
4 year in, year out, and we ought to be able to present that, and
5 there's no -- I mean, there's nothing prejudicial about telling
6 the jury who we are as a company.

7 THE COURT: It is primarily just hearsay is the
8 problem. I'm afraid, Mr. Hill, that's not what 8036 is about.

9 MR. HILL: And, Your Honor, again, I don't know if
10 their objection is to the document as a whole or to this
11 particular portion that they brought out, but this particular
12 portion is of no, you know, real significance to the purpose
13 of the overall use of the document.

14 THE COURT: I understand that. No, my issue is that
15 this is hearsay. I understand you're entitled to introduce
16 your business, but you have to do that through proper
17 evidence, and I'll sustain the objection to 573.

18 MR. HILL: Your Honor, may I ask a question about
19 that?

20 THE COURT: You may.

21 MR. HILL: To the extent that this brochure is
22 demonstrative in the sense that it demonstrates the various
23 systems and things that Elbit uses and works on, develops, you
24 know, the pictures, for instance, throughout it, we still have
25 resort to those?

1 THE COURT: I think you can offer the pictures as
2 demonstratives, and if they have objections to them, they'll
3 raise them in the course of what I hope is the trial procedure
4 that I think I'm going to hear about, but I'm just saying it's
5 not a proper exhibit.

6 MR. HILL: Thank you, Your Honor.

7 MR. DHANANI: Thank you, Your Honor.

8 Turning you to page 15, and that's the bucket called
9 the Gilat Agreement, and the PX number is PX 215. The argument
10 here is simply one of preservation, Your Honor.

11 We did file a Daubert, which Your Honor considered
12 and denied, and the Daubert, the argument involved that the
13 Gilat agreement is not comparable, different patents, parties,
14 no economic comparability, limited time frame. It was limited
15 in terms of inventory, and it acted as a de facto injunction,
16 among other things on docket 314, and this is simply to
17 preserve the objection, Your Honor.

18 THE COURT: All right. Your objection is overruled
19 but preserved.

20 MR. DHANANI: Thank you. Moving you to page 24, I
21 believe the bucket should be Hughes-Business. The first two
22 are simple. 177 has been withdrawn by Plaintiffs. 180 we're
23 withdrawing our objection.

24 As to PX 494, can you pull that up? This document is
25 a presentation from 2003 concerning Spaceway. It's a lengthy

1 document, but Spaceway is not relevant because it's not an
2 accused product in this case, and that's essentially the basis
3 for our objection. I'm happy to go through and --

4 THE COURT: No, let me hear the relevance first and
5 then maybe you can respond to that. Mr. Flynn?

6 MR. FLYNN: Your Honor, while the title of this
7 presentation may have the Spaceway term in it, this is a
8 presentation Pradman Kaul gave at an industry forum, so it's
9 clearly -- you know, and Pradman Kaul is the CEO of Hughes.

10 THE COURT: They're not claiming it's hearsay, so --

11 MR. FLYNN: Relevance, I understand. What we are
12 using this document for is -- it is Mr. Kaul's explanation of
13 the Direcway system, which was the existing system at the time
14 they were introducing the Spaceway system, and this is -- the
15 Direcway system are part of the accused units in this case.

16 THE COURT: So is this a limited portion of the
17 document is about the Direcway system and that's what you want
18 to use?

19 MR. FLYNN: Yes, Your Honor.

20 THE COURT: All right. Do you have any problem with
21 redacting the part of it that deals with Spaceway?

22 MR. FLYNN: No, Your Honor.

23 THE COURT: Okay. Does that address the objection,
24 Mr. Dhanani?

25 MR. DHANANI: Yes, Your Honor. Thank you very much.

1 That would address the objection for us.

2 THE COURT: All right. Then the objection will be
3 overruled subject to redaction of the Spaceway portion of it,
4 and I'm not saying all mention of Spaceway has to come out,
5 but the part of it that's just about Spaceway should be
6 redacted.

7 Okay. What's next, Mr. Dhanani?

8 MR. DHANANI: Page 26, and that's Hughes competitive
9 analysis.

10 THE COURT: All right. What's the objection there?

11 MR. DHANANI: Sure. Based on some of the
12 discussions today, we're withdrawing the first six of those.
13 That's 111, 112, 116, 117, 118, and 120.

14 THE COURT: You're withdrawing your objections to
15 those?

16 MR. DHANANI: Yes, Your Honor.

17 THE COURT: Okay.

18 MR. DHANANI: I believe 124 has already been
19 withdrawn by Plaintiffs. I'll just turn to the ones that we
20 we're maintaining an objection. 146 is one, and it's -- the
21 objection in 146 is similar to some other issues that are on
22 the back page, so I'll just address it with 146 to start off
23 with.

24 This is a presentation for Hughes competition. In
25 particular, we believe that the objections that we've made here

1 are -- the sections that are in here that relate to potential
2 copying issues are one subject to a MIL that Your Honor has
3 carried.

4 And then, secondly, we believe that the sections in
5 here related to Shiron and competition are not relevant to any
6 particular issues that remain in the case since they're
7 basically no longer asserting lost profits.

8 So if you could turn to the particular slide? If we
9 can switch, Ms. Andrews? Thank you. And it's page 24 of the
10 exhibit. And if you page through a slide, and starting off it
11 basically has some background information and information about
12 InterSky and product offerings.

13 And if you could go to the next slide here, it talks
14 about Shiron InterSky products, and what we understand is that
15 one -- there's no longer a claim for lost profits that's being
16 made, I believe, and Plaintiffs have represented that, as I
17 understand it, so the objection here is now what's the
18 relevance of these exhibits that discuss Shiron.

19 THE COURT: All right.

20 MR. SUDARSHAN: Your Honor, our relevance response
21 would largely mirror our previous discussion on Hughes'
22 monitoring of Shiron's business activities competing on common
23 customers.

24 Their general -- Hughes' general knowledge of Shiron
25 in the marketplace is relevant to the facts we intend to stitch

1 together for our willfulness claim. It's also relevant to the
2 Georgia Pacific factors relating to the relative positioning in
3 the marketplace and whether or not the parties were
4 competitors. This is directly relevant to that.

5 THE COURT: All right. Mr. Dhanani, that sounds
6 like a reasonable relevance argument. How is anything in here
7 prejudicial?

8 MR. DHANANI: In particular in here, there are
9 characterizations of Shiron itself, so what I -- from what I
10 understand is that the argument that they want to make on
11 relevance is there was monitoring going on at Shiron.

12 And if that's the case and that's the limitation of
13 it, the only further response I have is we would want this to
14 not be used for the purposes of basically stating copying, and
15 that was part of the motion in limine that we filed that Your
16 Honor had carried, so the remaining portion of the objection
17 here is that they're not offering this for the purposes of
18 later accusing us as copiers.

19 THE COURT: Okay. Well, the copying issue will be
20 dealt with on the motion in limine, but I'll overrule the
21 objection to 146.

22 MR. DHANANI: And it will be the same point on 299
23 and 300, so that will resolve those issues as well.

24 THE COURT: All right.

25 MR. DHANANI: The remaining issue on 153 -- there's

1 actually two other issues, but first let me turn to 174, if
2 that's okay, PX 174. Could you turn to the slide on InterSky
3 on this one? Keep going.

4 So this particular one, Your Honor, it's basically --
5 one, it's cumulative of the information already provided, but
6 the extra prejudice here is that there is a description, if you
7 keep going, of the InterSky product.

8 And in this case, the view is that the jury could get
9 confused, and that's the prejudice here, and perhaps consider
10 that they ought to do a comparison of the two products as
11 opposed to doing a comparison of the patent claims to the
12 products to determine infringement.

13 If they see things related to DVBS-2 forward channel,
14 return channel descriptions, there's going to be a temptation
15 by the jury to try to compare products to arrive at
16 infringement, and that's the prejudice, as opposed to comparing
17 claims to the product, which is an irrelevant inquiry.

18 So they have the exhibits that deal with the
19 competition to make the case on Georgia Pacific, and the other
20 relevance that Mr. Sudarshan mentioned, the additional point of
21 InterSky products and the description specifically of return
22 channels, could confuse the jury to do that type of comparison
23 for product to product, as opposed to claims to product.

24 THE COURT: All right. Well, the jury will receive
25 instructions that I think will deal with that, but I'll

1 overrule that objection.

2 MR. DHANANI: Thank you. Moving up to 153, the
3 objection here, Your Honor, is this is -- the article that's
4 mentioned below is -- this was an email sent within Hughes,
5 but the consideration here is that it's an article, and it's
6 not something that Hughes wrote. That's why we're maintaining
7 a hearsay objection to the article.

8 THE COURT: All right.

9 MR. SUDARSHAN: Your Honor, we're not offering it
10 for the truth contained within the article. We're offering it
11 to the extent that there is a list within Hughes called
12 competition where they were tracking as of 2008, at least,
13 what Shiron was up to in the marketplace, and we think it's
14 certainly relevant for the reasons we've discussed before
15 about the general -- the parties' general positioning in the
16 marketplace and the extent to which Hughes thought Shiron's
17 technology was valuable.

18 THE COURT: All right. I don't believe that's a
19 hearsay use, so I'll overrule the objection.

20 MR. DHANANI: I believe quite a bit of the ones on
21 the next page have been withdrawn, and we can get you a list
22 of that either right now if you like or --

23 THE COURT: Tell me which ones there are live
24 objections to, and that's good enough for me.

25 MR. DHANANI: The ones that -- so the ones there are

1 live objections to are 181, 299, 300, and 301, but they
2 address the same issues you've already addressed with respect
3 to the other issues we've talked about.

4 THE COURT: All right. So those objections will be
5 overruled as well.

6 What's the next bucket?

7 MR. DHANANI: The next bucket, Your Honor, is one
8 that we're -- it's the DirecPC bucket on page 29. The only
9 live issue on that one is on 272, and we're going to go ahead
10 and withdraw those objections -- that objection. I believe
11 the other ones have already been withdrawn by Plaintiff.

12 THE COURT: All right.

13 MR. DHANANI: Turning you to the Hughes HN/HX --

14 MR. FU: If you can confirm that 123 is also in that
15 bucket, DirecPC?

16 THE COURT: I don't have that one grouped in the
17 DirecPC bucket.

18 MR. FU: I'll double check that.

19 MR. DHANANI: Turning you to page 32, Your Honor,
20 Hughes HN/HX documents.

21 THE COURT: All right.

22 MR. DHANANI: The first live objection remaining is
23 on PX 182, and on that one, our basic objection on this one is
24 relevance here since this is a draft document, an executive
25 summary which appears to be a draft, and there's plenty of

1 other documents regarding cellular backhaul, so we're just --
2 we're not really sure of what the relevance of this particular
3 document is now to the case.

4 THE COURT: All right. So it's a relevance
5 objection. What's the response?

6 MR. SUDARSHAN: Your Honor, I'm not sure it is some
7 type of draft in progress. We've seen lots of documents
8 within the company that get released as a 1.0 and then a 2.0
9 and then a 3.0.

10 So there is no indication of red lines within the
11 document that it's some type of -- kind of neither here nor
12 there document, not really reflecting something in a particular
13 state and time.

14 I think this document purports to provide an
15 executive summary of the HX system for backhaul at a certain
16 point called 1.0 was the name of the document, so I don't see
17 it as a --

18 THE COURT: All right. I'm satisfied. I think the
19 Defendant can explain if there is something that needs to be
20 explained about it, but I'll overrule the relevance objection.

21 MR. DHANANI: Okay. Going to 193, Exhibit 193 on
22 Hughes Satellite Broadband Technology, the main objection
23 here, Your Honor, is page two contains the full revenue, and I
24 believe there is another reference to the full revenue as
25 well, so if we can agree to remove those and redact those,

1 then we would be satisfied on that one.

2 THE COURT: The part you would be talking about
3 redacting is the line that says 2006 revenues \$858 million?

4 MR. DHANANI: Yes, Your Honor.

5 THE COURT: All right. Is there an objection to
6 redacting that?

7 MR. SUDARSHAN: No, Your Honor.

8 THE COURT: All right. So ordered.

9 MR. DHANANI: The next live objection is at Exhibit
10 PX 208, Your Honor. This one there's a relevance and
11 prejudicial objection here, Your Honor, since this is a
12 document, Heritage of Hughes Solutions, that does reference
13 Hughes' products, but it mentions certain facts and
14 information, or purports to do so, regarding Personal Earth
15 Station and other aspects talking about internet capabilities
16 for various products, which is going to be a contested issue,
17 and this doesn't offer a complete picture of that particular
18 history.

19 THE COURT: Is this a Hughes document?

20 MR. DHANANI: It is, Your Honor.

21 THE COURT: So -- and your objection is that it is
22 misleading?

23 MR. DHANANI: Yeah, this particular document is
24 misleading, Your Honor, yes.

25 THE COURT: Why shouldn't that be something that you

1 explain? I'm -- how is this document misleading?

2 MR. DHANANI: It starts with the phrase our VSAT
3 network communication experience began with narrowband systems
4 such as Personal Earth Station, and PES has quite a bit of
5 other features other than just narrowband. And what we
6 understand is the Defendants (sic) are going to try to make
7 some use of this to try basically claim that PES was limited
8 to a narrowband solution as opposed to being -- having broader
9 capabilities.

10 THE COURT: Well, I think as the creator of the
11 document, you can explain that, but I'll overrule the
12 objection to it.

13 MR. DHANANI: All right. As to the remaining ones,
14 we understand 108 has been withdrawn, and we're withdrawing
15 our objections as to the rest.

16 THE COURT: All right. What's the next bucket?

17 MR. PONDER: Your Honor, if we can turn to the
18 Hearsay Publication bucket, this is page 17.

19 THE COURT: Okay.

20 MR. PONDER: So the first set of objections I'd like
21 to talk about, Your Honor, are all these publications that are
22 the Comsys reports. Our objection to them, I would propose,
23 should be revolved in a similar manner as we were earlier
24 talking about the entire market value rule. What we're
25 seeking to keep out of these or redact it out are the overall

1 revenue numbers of Hughes.

2 I can -- let's go ahead and take a look at PX 329,
3 and it is on page -- I just lost the page. We believe this
4 document has -- it has a total -- it has a total revenue number
5 in it. It talks about the strength of the company on page
6 three of the document.

7 So, for example, if we look at 2.2, we can see it
8 talks about how Hughes was acquired for \$2 billion by Apollo
9 Private Equity Group, there in the middle, and it talks about
10 the corporate ownership. Over here on the other side, it's got
11 total revenues, operating profit and losses.

12 So we would just propose, rather than stepping
13 through all these documents, if the Court is so inclined, to
14 suggest that the Plaintiff propose redacted ones that do not
15 have the financial -- overall financial information, kind of
16 like with the 10K's.

17 THE COURT: All right.

18 MR. HILL: We can do that, Your Honor.

19 THE COURT: All right. Then that will be this --
20 which documents are we dealing with? Is this the whole
21 Hearsay Publication bucket?

22 MR. PONDER: It's all of the documents that Comsys,
23 C-O-M-S-Y-S, in the name.

24 THE COURT: Okay.

25 MR. PONDER: And then we can -- I'll step through

1 the other ones.

2 If we could go to PX 456, this is on page 18. This
3 is the Broadband Satellite Markets report. If we look at page
4 98 of the document --

5 MR. HILL: And, Your Honor, if I can, just to
6 clarify, for those Comsys reports we just discussed, I noticed
7 Mr. Ponder identified some things in text, things that aren't
8 apparent, you know, EMV related issues.

9 Can we ask as part of this as well that Hughes will
10 identify for us what it is they're most concerned about with
11 these documents? We want to make, you know, sure we redact,
12 one, what matters and, two, what they're pointing at here.

13 THE COURT: I certainly understand that they're
14 going to identify the numbers in there that they object to.

15 MR. HILL: Thank you, Your Honor.

16 MR. PONDER: Your Honor, one thing we'd ask on that,
17 if you can take a look at just the list, we have the Comsys
18 report in many different forms. These are very large
19 documents. Some versions of it I've seen get up to a hundred
20 pages, Your Honor.

21 I don't think -- first of all, they're hearsay market
22 publications. I -- I think the issue is there are numbers
23 through it. I think it would be easier if Plaintiff could
24 excerpt what they want and then we can tell them if the pages
25 they need have the problematic portions.

1 THE COURT: Well, what is the response to the
2 hearsay objection on these Comsys documents?

3 MR. HILL: Your Honor, these Comsys documents are
4 80317 market data. This is -- this is sales data on a market
5 segment that's regularly published by an entity Comsys that's
6 in the business of publishing market data, and that's what
7 these are. These are market reports, and so they have a
8 hearsay exception under 80317.

9 With regard to the issue of only using portions of
10 the document, Your Honor, I've been on both sides of that fence
11 where I get criticized for putting in an incomplete document,
12 but then criticized for putting in too complete of a document
13 or the complete document, so if the Court has a preference and
14 wants us to limit these in some way, we certainly can endeavor
15 to do that.

16 THE COURT: I would prefer to criticize you for an
17 incomplete document, so --

18 MR. HILL: I understand, Your Honor.

19 THE COURT: I think that you should just limit them
20 to the part you want, and if you get criticized for it being
21 incomplete, you just blame me. I'll back you up on it.

22 MR. HILL: I hope the jury will be receptive to my
23 defense, Your Honor.

24 THE COURT: You can say you were ordered to do so,
25 but I -- no, I don't think that it's proper to just put in

1 entire market compilations if you're only seeking to rely on a
2 portion of them.

3 MR. HILL: Yes, sir.

4 THE COURT: So I think it would be fair to put it on
5 the Plaintiff to identify the parts of these documents that
6 they want and then on the Defendant to object if there's a
7 part of it that they think is problematic.

8 MR. HILL: Thank you, Your Honor.

9 THE COURT: All right.

10 MR. PONDER: If we can turn back to -- it's exhibit
11 number PX 456, Your Honor. It's on page 18. This is the
12 Broadband Satellite Markets report. I think this one has a
13 similar issue if we can go back to page 98, Mr. Aquino.

14 So, for example, this is a market compilation that
15 purports to say that two -- two-way broadband VSAT revenue in
16 various parts of the world. You know, for 2019 they were
17 predicting a total of \$602 million in North America. In Latin
18 America it's \$290 million. Grand total at the bottom two
19 trillion -- wait, \$2 billion. I mean, these numbers are --
20 shouldn't be coming in.

21 MR. HILL: Your Honor, the concern in Uniloc
22 regarding skewing the damages horizon by talking about numbers
23 is not concerned with the size of the market as a whole.
24 That's what this is. These aren't Hughes' sales. These are
25 not any individual sales. This is the market as a whole by

1 region worldwide.

2 It's relevant to show the nature of the market that
3 the parties compete in, and it doesn't implicate the concern
4 that the Uniloc case presented about skewing the damages
5 horizon by talking about a particular parties' gross revenues.

6 THE COURT: And what's the relevance of the size of
7 the worldwide market?

8 MR. HILL: Your Honor, it goes to commercial success
9 of the product in terms of showing how the product is and
10 commercial success in various regions, and then also as you
11 get into these documents, it goes a little more granular than
12 just two-way broadband VSAT. It gets into other related
13 technologies where you can see comparisons between, I guess,
14 the variety of technologies in the market and the relative
15 success.

16 MR. PONDER: Your Honor, on that point, commercial
17 success, the only way you can claim commercial success here
18 based upon these sales being rolled into this lawsuit if their
19 position is that everybody's making use of their patented
20 technology.

21 Now, obviously -- let's just start at the high level.
22 We're talking about U.S. patents. We can't tie any commercial
23 success to a U.S. patent to sales in Sub-Saharan Africa.

24 But to back up, there are a number of player in the
25 marketplace that they haven't sued and they haven't licensed,

1 and they shouldn't be permitted to say, oh, our technology is
2 important and it's enabled, you know, North American two-way
3 VSAT to be a \$602 billion marketing year.

4 They have no -- they -- they want to preclude Hughes
5 from pointing out those products are -- they don't want us to
6 talk about those products, and yet they're trying to get the
7 benefit of the sales of those products to tell the jury, hey,
8 these patents are really worth something, and that's -- you
9 know, that's a big problem.

10 THE COURT: What are they preventing you from
11 talking about?

12 MR. PONDER: Well, Your Honor, I think we talked
13 about before non-infringing alternatives, these other products
14 that are in the marketplace, and they say, well, we haven't --
15 we haven't sued them and you haven't shown that they infringe
16 and there's nothing about them in the case.

17 If there's nothing about them in the case being
18 infringing or non-infringing how are they able to point to the
19 sales of those products if their experts don't have competent
20 evidence and opinions to show that those products practice the
21 patents.

22 THE COURT: All right.

23 MR. PONDER: Your Honor, to simplify it, I think the
24 point is commercial success, you have to show a nexus between
25 the sales that you're saying are evidence of success and the

1 patent.

2 Saying that there were 602 -- \$602 million in sales
3 in North America two-way broadband VSAT across all participants
4 in the market, there's no evidence to tie that back to these
5 patents.

6 THE COURT: I can understand that the relevance of
7 this may be marginal, but I don't see the prejudice since
8 there is no claim that these are Hughes' revenues.

9 MR. PONDER: Well, Your Honor, the problem is Hughes
10 is a significant player in the market, and some of
11 these things these other parts of these reports are going to
12 say is that Hughes has 50 percent of the market in North
13 America, that it has probably 30 percent, or something like
14 that, globally.

15 And so if you're going to have the expert talking
16 about market share and he's going to mention, oh, well, the
17 worldwide market is in North America, well, that's \$602
18 million, and then around the world it's \$2 billion. I mean,
19 the jury is not stupid. They can figure out the implication
20 that Hughes is making a billion dollars from selling things
21 around the world.

22 And we have the actual market sales data. We've
23 produced all of our actual sales. We've produced the
24 quantities. They know the pricing, and they're only going for
25 a royalty that's based upon a one-time running royalty per sale

1 of a product of \$18. So trying to say, oh, \$18, but look at
2 how many -- you know, that comes out to \$60 million when you're
3 making 602 million in 2019 is very prejudicial.

4 And that's the exact type of skewing that was in
5 Unilock and the other entire market cases where the Plaintiff
6 was trying to say, oh, Microsoft should kick over here a couple
7 of dollars because they're selling Microsoft Office for several
8 hundred dollars. That's the exact type of skewing that the
9 entire market value rule is trying to prevent.

10 THE COURT: I believe that there are relevant uses
11 of this document. There may be improper arguments that could
12 be advanced based on it. If those arguments are advanced,
13 then they can be dealt with, but I'll overrule the objection
14 to this exhibit.

15 MR. PONDER: If we could turn to Exhibit 574, this
16 is a hearsay document that purports to be the Shiron press
17 release announcing that they won an award.

18 THE COURT: All right. Is there a response to the
19 hearsay objection?

20 MR. HILL: Your Honor, yes, there is a response to
21 the hearsay objection. I apologize for the delay on our side.
22 Your Honor, what we're showing here is Shiron's praise in the
23 market.

24 THE COURT: By Shiron?

25 MR. HILL: It is -- I guess it is in that sense, but

1 they were awarded a third party award recognizing their place
2 in the market. That's what they're promoting. It's not an
3 award they gave themselves.

4 THE COURT: I understand that. I -- my problem is
5 it does appear to be hearsay, so I'll sustain the hearsay
6 objection to 574.

7 MR. PONDER: Turn to -- we will withdraw the
8 objection to -- oh, I'm sorry -- the exhibit was withdrawn.
9 Never mind. We will withdraw the objection to 588.

10 Can you put up 587? Your Honor, we object to this
11 one as being a hearsay document.

12 THE COURT: All right.

13 MR. SUDARSHAN: Your Honor, the basis for including
14 this is we believe it has admissions from a party opponent,
15 namely Mr. Pradham Kaul, in the article DirecPC. There were
16 statements made by DirecPC that go to questions in our case as
17 to what the technology limitations were at the time of the
18 invention. DirecPC was the one-way service prior to the --

19 THE COURT: What's the answer to the hearsay
20 objection to the overall document?

21 MR. SUDARSHAN: I can see that's tough, Your Honor.
22 I -- I think the statements within, though, are certainly not
23 hearsay.

24 THE COURT: The trouble is you can't prove the
25 admissions by hearsay, so I'll sustain the objection.

1 MR. SUDARSHAN: I understand, Your Honor.

2 MR. PONDER: If we can have Exhibit 589? I believe
3 this is a similar document, Your Honor, appears to be an
4 article printed off from WestLaw entitled Hughes to offer two
5 way DirecPC service.

6 MR. HILL: Your Honor, this is of like kind. I
7 think the Court's prior ruling would control this as well.

8 THE COURT: All right. So ordered.

9 MR. PONDER: Next one, Your Honor, is 591. I think
10 this is similar, Your Honor.

11 MR. SUDARSHAN: Yes, Your Honor.

12 THE COURT: All right. I'll sustain the objection.

13 MR. PONDER: The next two exhibits were withdrawn.
14 The next exhibit with objection is 594. This is an internet
15 print of -- I believe it's -- it purports to be an article in
16 the McKinsey Management Consulting Firm publication. We
17 believe it's hearsay and not admissible as well.

18 THE COURT: All right. And what's the response to
19 the hearsay objection?

20 MR. FU: Your Honor, this is similar to an article
21 that we had looked at earlier which is used to show skepticism
22 in the industry. It's not used to show, you know, that it
23 wasn't possible. It's just used to show that people in the
24 industry were generally questioning it.

25 THE COURT: And point out to me --

1 MR. FU: The statement?

2 THE COURT: -- the language that you rely upon.

3 MR. FU: Yeah.

4 MR. SUDARSHAN: Your Honor, it's on the second page.

5 MR. FLYNN: We can pull it up online.

6 MR. FU: Yeah, we -- yeah, we -- if we can switch
7 the -- yeah. Satellite technology isn't capable except in
8 conjunction with another pathway of providing the two-way
9 interactivity necessary for broadband access.

10 So this is skepticism in the industry. McKinsey
11 is -- puts out reports of generally what goes on, and, you
12 know, so it's expressive of --

13 THE COURT: This is for none-obviousness? Is that
14 what --

15 MR. FU: Yes.

16 THE COURT: Okay.

17 MR. PONDER: Your Honor, the problem and difference
18 between this and the earlier article, the earlier article was
19 at least a technical publication and the IEEE, which is at
20 least a respected actual -- you know, but those are POSITAs
21 out there. Those are engineers.

22 This is a management consulting firm. I mean, this
23 would be the same as if Deloitte & Touche with their award
24 saying that Shiron is great. It's the same as them saying, oh,
25 well, this technology is innovative.

1 The case law for secondary consideration says that
2 praise by others and that sort of thing requires a tie to the
3 industry, and industry is, you know, the technical term of the
4 art referring to -- to people that invent and work in that
5 area, and McKinsey Management --

6 THE COURT: Of course, this is not praise. That's
7 not the issue here; right?

8 MR. PONDER: No, Your Honor. That rule applies also
9 for long felt need as well as failure by others, all of those.
10 They're only relevant if there is a showing that it's by
11 people in the industry.

12 If I say, for example, Your Honor, there's no -- you
13 know, it's not practical to have supersonic airliners and I put
14 that in my Wall Street Journal article, that's not a POSITA.
15 There's not -- that isn't enough under secondary
16 considerations. Now, if somebody who works in the industry,
17 somebody working for Boeing, for a jet manufacturer, that's
18 enough where people that keep up with --

19 THE COURT: Whether this would be enough to support
20 their position, if it's the only evidence that's worth
21 arguing, but I'm assuming that will not be the case, and I do
22 think this is relevant and for a non-hearsay use, and I'll
23 overrule the objection to 594.

24 MR. PONDER: The next one, Your Honor, is 597. Ms.
25 Andrews, if we can get -- thank you. This is an article from

1 the New York Times, Your Honor. We would say it's hearsay.

2 MR. HILL: Your Honor, I'm sure the Court can tell
3 by just looking that this bears the imminent signs of
4 reliability because it's an ancient document. It's over 20
5 years old, so I think we have a hearsay exception to this one.
6 It's a printed publication periodical, so it's
7 self-authenticating. I think that gets us there.

8 THE COURT: All right. I think that does get them
9 past the hearsay objection. Is there any other objection?

10 MR. PONDER: Okay. Your Honor, that's our argument
11 for that one.

12 THE COURT: All right. I'll overrule the objection
13 to 597.

14 MR. PONDER: Go to 612, Your Honor. So this is an
15 article that -- actually, could you scroll down?

16 Your Honor, this is another document that relates the
17 Gilat agreement issue that Mr. Dhanani referred to earlier
18 about the Gilat agreement, Gilat lawsuit not being comparable,
19 so we're objecting to the introduction of this document. It's
20 a press release describing the infringement allegations in that
21 case, Your Honor.

22 THE COURT: All right.

23 MR. HILL: Your Honor, it's a press release.
24 There's no hearsay issue, and the Gilat agreement, as the
25 Court knows, has been the subject of objections that will be

1 overruled in terms of its relevance and admissibility, so we
2 ask that it come in.

3 THE COURT: Are you just preserving your position on
4 it, Mr. Ponder, or do you have further --

5 MR. PONDER: Yes, Your Honor. I think it was argued
6 for quite a long time in the Daubert, and we didn't want to
7 take up --

8 THE COURT: All right. Then I'll overrule the
9 objection.

10 MR. PONDER: We will withdraw our objection to
11 Exhibit 676. If we can move to Exhibit 694. This is a
12 hearsay article, Your Honor.

13 THE COURT: All right.

14 MR. PONDER: It appears to be from 2001. It's
15 actually -- we also -- it's not actually clear the
16 publication.

17 MR. LEE: Your Honor, this exhibit was withdrawn.

18 THE COURT: All right.

19 MR. PONDER: I believe that resolves the Hearsay
20 bucket, Your Honor. If you can turn to the Bluetide bucket,
21 Your Honor, this is on page eight.

22 So if I -- let me start by referring to the Bluetide
23 as the former customer that's been dismissed with prejudice.
24 Exhibits 9, 10, 11, 28 -- my apologies, 28 has been
25 withdrawn -- 47, 51 are -- and 74 are the reseller agreements

1 between Hughes and Bluetide.

2 We don't think that those are relevant. It's a party
3 that's been dismissed from the case with prejudice. In
4 addition, we don't think there's any claim to any royalty that
5 can be based upon those products by application of patent
6 exhaustion, Your Honor.

7 MS. FAIR: Your Honor, the sales made to Bluetide
8 were by Hughes, so there's still sales that are at issue in
9 this case. There was no money paid for Bluetide being
10 dismissed, so there's not a patent exhaustion issue. The
11 dismissal with prejudice only affects Bluetide's liability,
12 and, therefore, these documents are still relevant.

13 MR. PONDER: Your Honor, under the applicable case
14 law, the only issue for patent exhaustion to attach is whether
15 a good has been licensed, and the case law is -- we submit is
16 clear that a dismissal with prejudice with respect to those
17 products operates as a covenant not to sue, in other words, a
18 license with respect to those products.

19 We're talking about 200 units. They were dismissed
20 with prejudice. That includes the right to have had them made,
21 to sell them, to use them. There are no -- the patentee has no
22 further right at this point with respect to the Bluetide units,
23 Your Honor.

24 THE COURT: All right.

25 MR. PONDER: And I would just note that there is no

1 requirement under the case law that a license be supported by
2 a royalty, Your Honor. A dismissal with prejudice is a
3 license nonetheless.

4 MS. FAIR: Your Honor, I believe the Federal Circuit
5 recognizes a distinction between a dismissal with prejudice,
6 which extinguishes liability for a Defendant who has been
7 dismissed, and a covenant not to sue, which is forward
8 looking. That's the Revolution versus Aspects Eye Wear case.

9 And so the issue of Bluetide's dismissal with
10 prejudice, because it didn't come with any payment and it
11 didn't come with any covenant not to sue, is not forward
12 looking.

13 THE COURT: But these are past sales.

14 MS. FAIR: Yes, Your Honor, they are. But the
15 license exhaustion issue only arises if you have a license.
16 There is no license when you only have a dismissal with
17 prejudice of a Defendant and that Defendant's liability for
18 past sales is extinguished, not other Defendants that may or
19 may not be in the same chain.

20 THE COURT: Do you have any case law that you can
21 offer on that, Ms. Fair?

22 MS. FAIR: Your Honor, I don't have it to hand, but
23 we can provide that to the Court later this evening if the
24 Court wishes.

25 THE COURT: What I'm going to do at this point is

1 sustain the objection, but if you come up with case law that
2 bears on this, I will consider that case law.

3 MS. FAIR: Yes, Your Honor.

4 MR. PONDER: Your Honor, Exhibit 69 was the invoice
5 for -- to Bluetide from Hughes. We believe that's the same
6 issue we were just looking at the agreements. The other thing
7 to note is it's with a foreign entity. This is actually
8 Hughes Brazil, not a party to this lawsuit.

9 THE COURT: And what exhibit is this?

10 MR. PONDER: It's PX 16, 16, 1-6.

11 THE COURT: I don't see that on --

12 MR. PONDER: Apologies, Your Honor. It's Exhibit
13 69, and I forgot that the Plaintiff's exhibit sticker -- that's
14 a deposition exhibit sticker, Your Honor. I apologize. It's
15 69. The description is invoice Bluetide Hughes with Bates
16 number 64850.

17 MS. FAIR: We withdrew this exhibit, Your Honor.

18 THE COURT: All right.

19 MR. PONDER: The next documents are emails between
20 Mr. Regard, Your Honor, and Hughes. We would submit that
21 these are all dealing with the relationship in sales and
22 relationship between Bluetide and Hughes. We don't -- we
23 don't see any relevance in those exhibits, Your Honor.

24 THE COURT: And that's which exhibits?

25 MR. PONDER: I believe the only ones that are left

1 are 60, 63, 64.

2 MR. SUDARSHAN: Your Honor, we have the Court's
3 tentative ruling on the Bluetide issue. Our recommendation
4 would be that we need to just think about that a little bit
5 more.

6 I think, Your Honor, Bluetide, even if there's patent
7 exhaustion, which I'm not sure there is, even if there's patent
8 exhaustion, some of these documents we think could be relevant
9 to the case still because they're evidence of pricing of the
10 accused products to customers.

11 So even if there's not a live claim against Bluetide,
12 this is evidence we took in the case that shows that our
13 damages expert has relied on for how these things are priced in
14 the marketplace upstream and downstream. We think that's
15 relevant to his analysis, so we think --

16 THE COURT: Well, he can still rely upon them. It's
17 just a question of are they appropriate to show to the jury,
18 and the jury is going to think that these are sales that are
19 part of the damages of the Plaintiff if you show them these
20 particular documents, so I --

21 MR. SUDARSHAN: Your Honor, on that point, our
22 expert has been clear that he's not -- his tabulation of our
23 royalty doesn't double dip. He does not -- he does not double
24 count units as between Bluetide and Hughes or as between
25 Hughes and downstream customers.

1 His tabulations are solely based on the Hughes units
2 and the Hughes database, so I don't think there was a risk of
3 some type of double counting just because we show the jury an
4 exhibit that goes to a customer's pricing.

5 And certainly there would be not -- because Bluetide
6 is not in the case, we would agree there would be no testimony
7 coming in on how many units were sold to Bluetide. I think the
8 limited relevance of this is pricing.

9 THE COURT: Well, if you have one of these documents
10 that you can offer just to show the price involved, then I'll
11 consider that, but, you know, I -- in the abstract, I don't
12 have any way of determining whether you've got that.

13 But if you can come to back to me tomorrow and show
14 me that you've got a document that shows price in a relevant
15 way that doesn't go into revenues from sales to Bluetide,
16 then --

17 MR. SUDARSHAN: Thank you, Your Honor.

18 THE COURT: -- we'll look at that.

19 MR. SUDARSHAN: All right. Thank you, Your Honor.

20 MR. PONDER: Your Honor, I believe the only other
21 exhibits left are 800, which is a spreadsheet of sales revenue
22 for Bluetide, which I think that would be covered by the
23 Court's prior ruling. I don't know if the Plaintiff wants to
24 argue this one specifically or agree that the current ruling
25 on Bluetide covered it.

1 MR. SUDARSHAN: We will take the Court's suggestion
2 under advisement this evening and come back on that.

3 THE COURT: All right.

4 MR. PONDER: So, Your Honor, I believe we've covered
5 every exhibit in the Bluetide bucket. All of them have been
6 sustained or withdrawn by Plaintiff at this point.

7 THE COURT: They're reserving the right to come back
8 and try again tomorrow, but at this point that's right.

9 MR. PONDER: We can move on to the ILeverage bucket,
10 Your Honor. We can start with Exhibit 7.

11 THE COURT: And what page are we on?

12 MR. PONDER: This is page 35, Your Honor. It's --
13 to provide context, ILeverage was the patent broker that was
14 engaged by Shiron in 2008 to consider selling the patents.
15 Exhibit 7 --

16 MR. FU: Your Honor, we withdraw Exhibit 7.

17 MR. PONDER: Your Honor, if we could confer for a
18 moment and see if there's any others that have been withdrawn
19 in this bucket before we proceed any further.

20 THE COURT: All right. Go ahead.

21 MR. HILL: Your Honor, while they confer, if I can
22 raise -- just a timing, I guess, request.

23 The issue we mentioned at the outset about the PES
24 demonstration and some new exhibits that have arisen because of
25 this deposition, we were -- just selfishly on our side, because

1 of staffing issues for when we may see the Court again, we were
2 curious if we could get that in front of you today because we
3 have one team member who was there who took the deposition, he
4 has all the firsthand knowledge, and we want to make sure that
5 we have him in front of you when that issue comes up.

6 THE COURT: All right. I was thinking I would do
7 that in the morning, but if you are afraid you won't have that
8 person available then, then we can do it this evening.

9 MR. HILL: I'm going to ask that person. Will we
10 have you in the morning? Okay. We can make it work in the
11 morning, Your Honor, if that's your preference, what you want
12 to do, but we just wanted to raise it.

13 THE COURT: I frankly was just going to --

14 MR. HILL: We were unsure when you would have the
15 time.

16 THE COURT: Refresh my recollection about the issue,
17 but if you -- that will just be a challenge for your advocacy,
18 if you can refresh my recollection.

19 MR. HILL: Well, --

20 THE COURT: But let -- Mr. Ponder, tell me where we
21 are on this bucket and then we can take a break and take up
22 the other matter.

23 MR. PONDER: We do have one, two, three -- eight
24 exhibit objections for this bucket.

25 THE COURT: All right. There are eight exhibits

1 remaining? Which ones are they?

2 MR. PONDER: Five, 6, 227, 228, 623, 624, 737, and
3 740.

4 THE COURT: And those have not been withdrawn?

5 MR. PONDER: Those have not been withdrawn.

6 THE COURT: Okay. All right. Let's see if we can
7 get through them quickly and then we'll turn to the other
8 matter.

9 MR. PONDER: Your Honor, Exhibit 227, if we can look
10 at that, this is an important document. This is a document
11 that the Plaintiff is using to assert willful infringement.
12 We have one objection to this. It's a very narrow issue, Your
13 Honor.

14 This document is an email that was between Hughes'
15 in-house lawyer Mr. Plastrik and an engineer Mr. Choquette, and
16 you can see that it has attachments. These attachments are
17 patent numbers, and the critical issue here is that Plaintiffs
18 are trying to submit just the cover email without the
19 underlying attachments, and it's highly prejudicial.

20 MR. FLYNN: We agree to include all the attachments
21 with these two exhibits, 227 and 228.

22 MR. PONDER: Okay. Well, then that takes care on
23 227, Your Honor, and 228. There is no objection to it so long
24 as the exhibit comprises -- Exhibit 227 will be replaced with
25 an exhibit that includes all those attachments that are listed

1 there by Bates number.

2 THE COURT: Okay.

3 MR. HILL: Your Honor, I hate to squash agreements,
4 but I want to point out to the Court when we do this, it's
5 going to make this about a 200-page exhibit, and it's going to
6 be -- 190 of those pages are things we'll never use in front
7 of the jury. It's going to be unrelated patents that we don't
8 care anything about, so --

9 MR. PONDER: I can help with that, Your Honor. What
10 we care about is that the attachment that is for the '073
11 patent and the '874 patents be included and just a slip sheet
12 noting that the other attachments have been omitted, and the
13 reason why it's -- go ahead.

14 THE COURT: All right.

15 MR. HILL: Yes, sir, we'll do that.

16 THE COURT: So greed.

17 MR. PONDER: If we could turn to -- if we could turn
18 to number six, Your Honor, this is the licensing spreadsheet.
19 This is a document that Elbit purports shows that the general
20 counsel at Hughes was contacted about -- was contacted by
21 ILeverage.

22 THE COURT: What's the objection?

23 MR. PONDER: 403.

24 THE COURT: And how --

25 MR. PONDER: I'm sorry. 403 and 803 hearsay.

1 THE COURT: Let's take the hearsay first. What's
2 the response to the hearsay objection?

3 MR. SUDARSHAN: Your Honor, I believe, and one of
4 our team members will correct me if I misspeak. I believe
5 there was a foundation laid at the testimony of Mr. -- during
6 the deposition of Mr. Aloush that he kept this record during
7 the course of his business at ILeverage.

8 And there was -- there was testimony that this is how
9 he tabulated who he had contacted on a running basis during the
10 course of his broker business, so this is a business record as
11 to ILeverage, and the foundation we would submit has been laid
12 during his deposition.

13 THE COURT: All right.

14 MR. HILL: There's one additional basis for that as
15 well, Your Honor. It is a business record no doubt, but the
16 way it was used in his deposition and the way he explained it,
17 it was used as a recorded recollection under 8035 that
18 refreshed his recollection about who exactly he contacted at
19 Hughes.

20 THE COURT: All right. Mr. Ponder?

21 MR. PONDER: Your Honor, I think we would need to
22 see what that testimony is to see that it was recorded
23 recollection. I don't -- I don't have that recollection. I
24 believe he was walked -- he was walked down a primrose path of
25 did you contact them, isn't that what this document shows,

1 Your Honor.

2 THE COURT: It says, you know, under 8035 that it
3 cannot be admitted as an exhibit unless it is against an
4 adverse party, which this --

5 MR. PONDER: This is Mr. Aloush, who is aligned with
6 the Plaintiff, the Plaintiff's, they claim, agent, Your Honor.
7 So the document should not be admitted under 8035.

8 THE COURT: But we're on to the business record
9 issue.

10 MR. PONDER: Okay. As to the business record, Your
11 Honor, this is a one off transaction for Shiron contacting
12 people about selling a patent portfolio, Your Honor. There's
13 no indication that he actually relies on this. It's a
14 one-time project. It didn't have the hallmarks of reliability
15 of, say, somebody keeping a list of things they sold that day,
16 a medical record or anything like that. It's a self-serving
17 document.

18 THE COURT: I guess I'll have to see his testimony.

19 MR. SUDARSHAN: I have it here, Your Honor.

20 THE COURT: All right.

21 MR. SUDARSHAN: If we can have the document camera,
22 the Elmo, please?

23 Bottom left square, Your Honor. This is where the
24 witness Mr. Aloush was asked, and it's referring back to
25 testimony that it was a spreadsheet maintained by Mr. Aloush.

1 He confirms.

2 What was the purpose of the spreadsheet?

3 It was to collect the information of the addressees
4 to whom we -- yeah, potential receivers of our sales material.

5 I'm not familiar, Your Honor, with any testimony
6 where he said it was limited to some type of one off thing, and
7 I also understand the record shows --

8 THE COURT: Where were you just reading from?

9 MR. SUDARSHAN: I'm sorry, Your Honor. It's in this
10 area here.

11 And to be clear, Your Honor, this Shiron transaction
12 was something that the ILeverage folks worked on for an
13 extended period of time. This was their business. It was to
14 go out and try to find buyers, and so there's pretty good
15 testimony here that that's the purpose of the spreadsheet is to
16 track who he's reached out to. Comes directly from his files.

17 THE COURT: Is he going to be a witness in this
18 case?

19 MR. SUDARSHAN: Through deposition, Your Honor.

20 THE COURT: And does he have further answer at the
21 top?

22 MR. SUDARSHAN: I think it flows over here, Your
23 Honor.

24 THE COURT: Oh, I see. All right. Mr. Ponder, why
25 isn't that sufficient? He is the custodian of that record.

1 He is the one who created it, maintained it. He said he did
2 it in the course of his business.

3 MR. PONDER: Your Honor, we would just submit that
4 a -- a patent sale, a significant transactional activity that
5 is supposed to be fundamental for the company, was selling off
6 their entire patent portfolio, that is not a regular -- that
7 is not an enterprise that one conducts in a regular manner as
8 contemplated in the business record exception, Your Honor.

9 THE COURT: All right. Well, I'll overrule the
10 objection to Exhibit 6.

11 MR. PONDER: The next one, Your Honor, is PX 623.
12 Your Honor, this purports to be a claim chart direct -- if we
13 go to the next page, Mr. Aquino. Or back one page. Oh, yes,
14 this purports to be a claim chart, and Plaintiffs are claiming
15 this as evidence of willfulness.

16 If we go back to the first page. We think it's
17 highly prejudicial for this document to be introduced. We
18 don't think it's appropriate considering the limitations that
19 were put on it.

20 The Plaintiff's agents specifically represented that
21 this chart, if it was actually transmitted to Hughes, and there
22 is a factual dispute as to that, that this was not to be
23 considered for any purpose other than to consider whether they
24 would buy -- whether it should buy the patent.

25 The second sentence says no opinion of infringement

1 validity or enforceability is expressed or implied. The last
2 sentence is this sales presentation is confidential and should
3 not be used for any purpose other than the purchase of the
4 Shiron patent portfolio.

5 So there is a problem with this. It's highly
6 prejudicial for it to be coming in. It's a document --

7 THE COURT: What's the prejudice?

8 MR. PONDER: They're claiming that this is the
9 document that put Hughes on notice of willful infringement.
10 Behind here is a claim chart that they say maps the claim
11 elements against the Hughes product.

12 THE COURT: Okay. And what's unfair about that?

13 MR. PONDER: What's unfair about it is back when
14 they talked to Hughes, they said we're not putting you on
15 notice of infringement, we just want you to take a look and
16 see if you're interested in buying the patents. They made
17 that expressed presentation.

18 For them to now be able to assert in litigation that
19 it is wilfulness when they said the only thing you're supposed
20 to use this for is to decide whether you should buy the
21 patents, and in the second sentence they say we're not even
22 telling you if you infringe. It's highly prejudicial and
23 unfair, Your Honor, and shouldn't be allowed as evidence of
24 willful infringement.

25 And we'd also offer that the witnesses are not sure

1 whether these exact documents were sent to Hughes, so these
2 were produced out of -- this particular document was produced
3 by Mr. Rosenfeld, so it's out of his files, but he produced a
4 number of claim charts, and he didn't have any recollection as
5 to which charts went to which companies. They contacted a
6 number of companies.

7 So putting this type of evidence in front of the jury
8 is highly prejudicial to suggest that this created notice when
9 they specifically said that that's not what we're doing when we
10 send you this notice.

11 THE COURT: I don't think that the limiting
12 information there is of particular import, but if there is not
13 evidence from which a reasonable jury could conclude that this
14 was sent to Hughes, then that's a different matter. What's
15 the response from Plaintiffs?

16 MS. FAIR: Your Honor, Mr. Aloush, who provided
17 these claim charts to Hughes, gave a deposition in this case,
18 and both parties have designated testimony from that
19 deposition where Mr. Aloush testifies that he made these claim
20 charts available to Hughes on his website and that he emailed
21 Hughes telling Hughes that they were available on the website.

22 Now, there's some deposition designations that Hughes
23 has that they say dispute that and undermine other parts of
24 Mr. Aloush's testimony, but it goes to the weight and not the
25 admissibility. There is evidence and testimony from Mr. Aloush

1 that he put these claim charts on his website and directed
2 Hughes to the claim charts on the website.

3 And so a reasonable juror could conclude from that
4 that Hughes was on notice of the allegations made in the claim
5 charts.

6 THE COURT: All right.

7 MR. PONDER: Your Honor, Mr. Aloush did not
8 authenticate this exhibit. This was an exhibit to
9 Mr. Rosenfeld's deposition that was held the next day. If we
10 could go back out to the first page --

11 THE COURT: Well, are you disputing that Mr. Aloush
12 testified that this document was on his website and that he
13 told Hughes that they could access it there?

14 MR. PONDER: He did not talk about this document.
15 Mr. Aloush had his own versions that he produced, and they're
16 different documents that he testified about.

17 Basically there's a huge stack of very different
18 charts. They can't use Mr. Aloush's testimony on this
19 document. This document wasn't used with Mr. Aloush's
20 deposition. It's the one that is out of Mr. Rosenfeld's file.

21 THE COURT: All right. Ms. Fair, what basis is
22 there to connect this to Mr. Aloush's testimony that you
23 referred to?

24 MS. FAIR: Your Honor, Mr. Aloush was at -- part of
25 this goes to where the documents came from. Mr. Aloush

1 produced them in response to a subpoena, and there were some
2 that were Bates-labeled and some that were not.

3 And so at his deposition, the specific documents that
4 when the Plaintiffs were questioning Mr. Aloush, the ones that
5 were asked about during that portion of the deposition were not
6 Bates-labeled. Those were the exhibits that we originally had
7 on the list.

8 Hughes objected and said these don't have Bates
9 labels, so we said, okay, we'll replace them with the
10 Bates-labeled version, so these are the same claim charts that
11 Mr. Aloush testified about in his deposition, and at Hughes'
12 request, we have replaced them with the ones that are
13 Bates-labeled.

14 MR. PONDER: Your Honor, I think that may be true
15 with other documents. I don't know that that's the issue
16 here, but they're trying to use Mr. Rosenfeld -- this is the
17 document that was produced out of Mr. Rosenfeld's file.
18 Mr. Rosenfeld didn't produce the documents to Mr. Aloush.
19 They're two different guys. They don't get along. They're
20 former business partners that sued each other.

21 THE COURT: Well, do you dispute what Ms. Fair said,
22 that this is just another copy of the document that Mr. Aloush
23 testified about?

24 MR. PONDER: I can't remember if this one is
25 because, frankly, there's about 20 to 30 of these, Your Honor,

1 and they change in different ways. The witnesses couldn't
2 tell you difference. If they have one that's page by page,
3 Your Honor, then I would just submit that we should bring this
4 back up tomorrow.

5 THE COURT: Well, at this point I'm going to
6 overrule this objection, and you can bring it back up if you
7 find something that is helpful on that, but 623 is overruled.

8 MR. PONDER: Give me one moment, Your Honor. I'm
9 looking for the deposition transcript. I misplaced mine.
10 Here it is. If we can bring up Exhibit 623. Oh, that's the
11 one we just did. Apologies. If you can go to 624. Oh, okay.

12 Your Honor, this is a document that was produced by
13 Mr. Rosenfeld. It's a hearsay document. It's a document he
14 prepared that purports to be a summary of what the '874 patent
15 covers.

16 There is no evidence that this was ever transmitted
17 to Hughes or anyone else. It was his like internal work
18 product. He's a patent lawyer. We can't see any relevance to
19 his assessment of what this patent covers.

20 If we can scroll down a little bit. It has a
21 background section here where it talks about what the
22 technology generally is. Scroll down, it has kind of a --

23 THE COURT: All right. The objection is hearsay and
24 relevance. Let me hear the response and I'll give you a
25 chance to reply.

1 MR. PONDER: Your Honor, if I can also say it's also
2 unfairly prejudicial because he's not an expert and shouldn't
3 be describing what the patent covers.

4 THE COURT: All right.

5 MS. FAIR: This is very similar to the last document
6 in that it is part of the ILeverage documentation that was
7 provided to Hughes that put them on notice both for marking
8 purposes and for willfulness, which Your Honor knows are both
9 at issue in this case, so it's not a hearsay use of the
10 document. It's the fact it was transmitted to Hughes. We
11 don't --

12 THE COURT: What's the evidence that it was
13 transmitted to Hughes?

14 MS. FAIR: I believe -- and we're trying to find --
15 again, the records that Mr. Aloush produced did not have Bates
16 numbers, so those were the ones we originally included on the
17 exhibit list. This is the one from Mr. Rosenfeld's file, so
18 we're trying to find to make sure that this is the same one
19 that Mr. Aloush testified about that was provided to Hughes,
20 but that was the intent.

21 THE COURT: Okay. Well, at this point you cannot
22 cite me evidence that says this was shown to Hughes?

23 MS. FAIR: I have to look in Mr. Aloush's deposition
24 and make sure this is the same document, but that's -- that's
25 why it's on our list, so if it's not, then we would withdraw

1 the exhibit. If you would give us until the morning, we can
2 find that testimony or withdraw it.

3 THE COURT: Okay. At this point, I'm going to
4 sustain the objection to 624. If you get me evidence that
5 supports it, I'll take it back up.

6 MS. FAIR: Yes, Your Honor.

7 MR. PONDER: If we can go to Exhibit 737. So, Your
8 Honor, this is the version that I think they're saying
9 Mr. Aloush testified to. If you would go down to the bottom,
10 please? I'm sorry. Can I get the whole frame so I can see
11 the Bates number? There is no Bates label, Your Honor, so
12 actually this goes back to the argument we just had.

13 They kept on their exhibit list the ones that don't
14 have Bates numbers, so we would ask you to reverse your ruling
15 with respect to the one that was from Mr. Rosenfeld's
16 deposition and say that the ruling with respect -- 623, and we
17 would make the same argument with respect to 319 that we did
18 for 623.

19 MS. FAIR: We're just going to use one, Your Honor,
20 so if we -- if Hughes prefer we use this one, we're happy to
21 use this one.

22 MR. PONDER: We don't prefer the use of either one,
23 Your Honor, but I would say the arguments we would make are
24 the same, so I think that -- we don't have to re-argue it,
25 Your Honor, but this would --

1 THE COURT: I'm thoroughly confused.

2 MR. PONDER: I'm sorry, Your Honor. This is the
3 document Mr. Aloush's testimony you saw earlier was about.
4 The one for 623, Mr. -- Mr. Rosenfeld wasn't the subject.

5 THE COURT: Just a moment. So this exhibit you
6 admit Aloush said he put on a website and told Hughes they
7 could access it?

8 MR. PONDER: We don't admit that that is the import
9 of his testimony. I'll admit, Your Honor, that that was how
10 you interpreted Mr. Aloush's testimony that was just shown a
11 few minutes ago.

12 I -- Your Honor, we don't admit that any documents
13 were ever sent to Hughes. I'm saying the testimony you saw in
14 connection with Mr. Rosenfeld you found supported the idea that
15 the '874 claim chart went to Hughes. That's -- what's what
16 we're saying, Your Honor.

17 THE COURT: I think I only heard about that
18 testimony.

19 MR. PONDER: Oh, we didn't see it. Well, can we see
20 the testimony since we have Mr. Aloush's exhibit here? I
21 think Rosenfeld's should come off and we should see the
22 testimony for this. I'm sorry. I'm a little confused.

23 MS. FAIR: Can I have the Elmo, please? So here is
24 deposition testimony from Mr. Aloush about an email that he
25 sent to Mr. Plastrik, a Hughes employee, where he says -- and

1 I'm starting here at the bottom of page 147 -- in particular I
2 would like to refer you to the claim charts showing the read
3 of the patents on actual VSAT and cellular backhaul
4 applications.

5 So we have testimony here from Mr. Aloush where he
6 sent an email to Hughes saying I'm talking about the claim
7 charts that I provided to you.

8 THE COURT: And is there testimony somewhere that
9 says that this is one of those charts?

10 MS. FAIR: Yes, Your Honor, give me just one moment
11 and I'll pull it up right now.

12 THE COURT: Okay.

13 MR. PONDER: Your Honor, I think we can actually see
14 the testimony again, the part that was also highlighted on the
15 page. If you can bring up Aloush 119, I think he actually --
16 I'm sorry. Deposition transcript. I believe we were just
17 looking at page 119. Go to the next page. Actually if we
18 could ask Ms. Fair what four pages were on the part that you
19 just showed?

20 MS. FAIR: It was starting on line 24 of page 147.

21 MR. PONDER: Okay. If we could go to 149, I
22 believe. Yeah, I would just point out that the follow-up
23 question there was -- if we can go to page 148?

24 The question was, is it your understanding that you
25 never sent him any confidential information; right?

1 Yes, your question is -- and then we go to the next
2 page -- whether or not I sent him claim charts?

3 No, any confidential information.

4 Well, based on what I see here, I didn't send
5 anything to him. I just referred him to the website.

6 As of that time, do you have any recollection that
7 there were any claim charts on your website?

8 Oh, sorry. If we could go to page 148 and look at 15
9 to 19, lines 15 through 19. So there's -- Mr. Aloush's email
10 didn't attach anything to it, and the response from Hughes was
11 that we're not going look at any of your confidential
12 information. There's -- there's no actual evidence that the
13 transmission of any claim charts he used.

14 THE COURT: There's no evidence that they read them.
15 There is evidence that they were expressly given access to
16 them.

17 Well, so I think that that is relevant evidence, so I
18 will -- and which is the document that we have settled on? I
19 think it -- I think it had an evidence tag of 319, but that may
20 have been a deposition.

21 MR. PONDER: That's right. It's Exhibit 737. So if
22 I understand, you're sustaining the objection with respect to
23 623, but overruling the objection with respect to 737.

24 THE COURT: All right. So ordered.

25 MR. PONDER: Take a look at Exhibit 740. Your

1 Honor, this is another version of the email involving
2 Choquette. Can we propose the same agreement, that the
3 attachments be -- the '874 patent and the '073 patent be
4 attached?

5 MR. HILL: Yes, Your Honor.

6 MR. PONDER: And with that, Your Honor, we are done
7 with the ILeverage bucket.

8 THE COURT: Okay. Mr. Hill, if you want to take
9 back up the matter regarding Mr. Messineo?

10 MR. HILL: Yes, sir, Your Honor. Mr. Sudarshan is
11 going to address the issue for the Court.

12 THE COURT: All right.

13 MR. SUDARSHAN: Your Honor, I have a few paper
14 copies. May I approach the bench with those?

15 THE COURT: Yes.

16 MR. SUDARSHAN: And, Your Honor, I have these in
17 electronic form to pull up on the screen as well.

18 Let me propose, Your Honor, proceeding in the
19 following way: And, first of all, thanks to the Court. We
20 appreciate the Court's indulgence in giving us the opportunity
21 to seek additional discovery on the authentication of the PES
22 demonstration system.

23 Just to refresh the Court's recollection, this was a
24 system that we -- a demonstration system that we challenged in
25 limine on the basis of authentication, and the Court granted us

1 leave to take the deposition of the gentleman who was purported
2 by Defendants to be able to authenticate it.

3 We believe that the deposition which proceeded on
4 Monday in Detroit confirmed our suspicions that Hughes is not
5 able to authenticate the dates and origins of the so-called
6 demonstration system in a way that's sufficient to establish
7 relevance to the jury.

8 So let me -- let me proceed by giving the Court an
9 overview of the components of the system, and then what I would
10 propose to do is just walk through the testimony from Mr.
11 Messineo and explain our view of how that shakes out with the
12 overall question before the Court, which is is this relevant
13 evidence of a prior art system.

14 On the first slide here, slide two, we have displayed
15 -- these are images that come to us from pictures that were
16 produced as attachments to Hughes' expert report. These are --
17 what you're seeing here, Your Honor, are pictures from the
18 system in Michigan.

19 There's one exception. The terminal outdoor unit, we
20 were not produced with pictures of those, so I'm just giving
21 you a sense of what those look like.

22 But this is the system overall. It's composed of
23 satellite dishes outside. In the middle you've got an operator
24 console. The console is hooked up to a hub -- various hub
25 equipment and also various terminal equipment.

1 And the way they've set this up to work is you've got
2 a laptop computer on the bottom right that accesses -- that's
3 connected via an Ethernet cable to one of the systems on the
4 bottom left.

5 And -- and what they've set up in the demonstration
6 is a way to use this overall terminal plus hub to access the
7 internet on the other side. So on one with side you've got
8 terminals. On another side you've got a hub. So the laptop is
9 connected to the terminal, and then the hub is connected to an
10 internet connection.

11 So the experiment, if you will, Your Honor, was they
12 were trying to show that with a laptop can you use this system
13 they created to get on the internet via the hub, and so what
14 I'll do here is walk the Court through the various parts here.

15 On the next slide, in terms of orientation, Mr.
16 Messineo was very clear that the system that he put together
17 did not exist in time before. This was -- this was a specific
18 combination of components that he brought together for purpose
19 of this litigation using particular software that was installed
20 for those purposes. So we view this as a custom built
21 litigation demonstration.

22 On the next slide is a summary of what I'd like to
23 show the Court. We believe there are a number of components of
24 the system that cannot be authenticated and that that was
25 confirmed by Mr. Messineo's testimony.

1 And before going through that testimony again, the
2 purpose that they're trying to offer the system for, Your
3 Honor, is they want to tell the jury that this is an actual PES
4 system that pre-dates November 1997. That's the filing date of
5 the patent.

6 And Dr. Wicker has relied on pictures of the system,
7 and we -- we expect that he will tell the jury that this proves
8 that, indeed, one could get on the internet with a pre-1997 PES
9 system, and we think that would be terribly prejudicial with
10 this system because the system itself didn't exist before '97.
11 It consists of parts that post-date 1997 and parts of unknown
12 origin and parts of unknown date.

13 On the next slide, Mr. Messineo told us that he
14 joined the company in '99, so this is -- this is relevant only
15 because 1997 November is the invention date, so Mr. Messineo
16 himself does not have personal knowledge having worked at
17 Hughes during the critical date and time, so he was not there
18 to examine this equipment in time. His testimony was to the
19 effect, Your Honor, this looks like it could be around that
20 time frame, for certain pieces, not for all.

21 On the next slide, we're diving here into the hub
22 equipment. So the claims of the '073 patent, Your Honor, cover
23 a system that's comprised of a terminal and a hub and other
24 parts.

25 And so we asked him to explain some of the cards that

1 were in the demonstration hub, and these are particularly
2 relevant because these cards are used as a LAN IO interface
3 module. That means they are -- they are using these cards for
4 the internet access portion of this, which the parties have
5 greatly disputed in this case as could the PES support internet
6 at the relevant time frame.

7 And so on this point when we asked him what's the
8 date of the interface module, he was unable to give us the date
9 for that, of either card that's involved in the hub system, and
10 that's the actual technology that's serving up the internet in
11 this demonstration system.

12 On the next slide, processor boards, this is the
13 actual logic, the brains of the hub that's processing the data
14 that's actually passing through the hub. Mr. Messineo thought
15 most likely that those boards pre-date '97, but he wasn't able
16 to confirm under oath that they do.

17 On the next slide, we point you, Your Honor, to Dr.
18 Wicker's testimony, which was -- which is -- which is an
19 interesting contrast. Dr. Wicker testified in his deposition
20 when we asked him about those very components, we asked him do
21 you have any information that the cards pre-date the filing of
22 the patent.

23 And he said it is my understanding that the equipment
24 itself pre-dated. I don't have information with respect to
25 specific cards, but it's my understanding that they pre-date

1 it.

2 And that was on the basis of counsel's
3 representations.

4 And Dr. Wicker is important here, Your Honor, because
5 the -- the demonstratives that we -- that were at issue and
6 that caused us to file the motion in limine, those were
7 presented through Dr. Wicker's expert report.

8 And in particular there were photographs and videos
9 that were shown to Dr. Wicker that we found out at his
10 deposition, even though he stated in his report that he had
11 inspected the system, we found out that he had not in person
12 seen the system.

13 He had seen the system through a video chat at a time
14 where, unfortunately, he had an eye procedure and he wasn't
15 able to see, so that's why we felt it was important to show the
16 Court Dr. Wicker's view was that all of this was pre-'97.

17 On the next slide, hub attenuators. These are the
18 actual dials that you use on the hub to tune them to particular
19 frequencies, and Mr. Messineo testified that he had to
20 configure and dial it -- turn these dials in a particular way
21 to set up the system. We asked him what was the date of the
22 attenuators. He said he didn't have the dates.

23 And keep in mind, he's putting all this together into
24 the system. It's not a system that existed. He actually put
25 this together.

1 On the next slide, another component of the hub.
2 What's the date of the system IF distribution block? This,
3 again, goes to the frequency modulation. He says, I don't have
4 dates for those. He thought they had been in the facility
5 since 2001, or at least since 2009. Wasn't able to confirm
6 that they pre-dated '97.

7 Turning now to the terminals, Your Honor. I've been
8 showing you his testimony on the hub. The terminal is what the
9 laptop was connected to in the demonstration system, and on the
10 terminals, Mr. Messineo testified that he believed they dated
11 from 1995. And the basis of that, he said, was a serial number
12 on the terminal that he believed had been shown some type of
13 information to suggest in a database that they were from '95.

14 On the next slide in the bottom left corner is the
15 record that was produced to us on Monday for the very first
16 time in this case. When we asked him, sir, have you seen that
17 record -- and we asked -- we asked if the record had ever been
18 produced, we found out that they had never produced that
19 record. Instead, they had -- counsel represented that they had
20 taken data from the record and put it in a letter to us in
21 March or April.

22 But until Monday we were never -- we had never seen
23 the actual business record that had a serial number purporting
24 to track to a particular ship date, and at an appropriate time
25 we'll take up the question of whether that business record is

1 admissible. We'd submit it's a violation of Rule 26.

2 THE COURT: What date does it show?

3 MR. SUDARSHAN: The date -- the date shown in the
4 database purports to have ship dates of -- in one case '95, in
5 some other cases '1997.

6 On the next slide, this is just more testimony, Your
7 Honor, about -- from Mr. Messineo on that database record. He
8 confirmed that he had no experience with that database. It was
9 just shown to him with counsel the day before the deposition as
10 he was getting prepared for it, so he wasn't able to confirm --
11 he does not use that database in the ordinary course of his
12 business.

13 And even if we were to take the record at face value,
14 the -- the other problem we have raised in the briefing is the
15 chain of custody, as I address in the next slide. The
16 terminals were not with Hughes. The terminals were obtained by
17 a gentleman named Ali Mohadjer, who is a consultant to Hughes
18 in this case. He's a litigation consultant. He used to work
19 at Hughes and now he has a business where he re-sells
20 equipment.

21 And so Mr. Mohadjer got some of the terminals from a
22 warehouse that -- from a company that he bought that was in
23 bankruptcy, and during the course of this litigation, he
24 testified that he discovered some of those boxes lying around.
25 Other -- other terminals he discovered -- he -- he actually

1 obtained from another third party, a leasing company, whose
2 name Mr. Mohadjer didn't remember.

3 And when we asked Mr. Messineo -- the next couple of
4 slides get to this, and the reason we think that's relevant is
5 we -- we thought it was important to know whether there was
6 any -- any guarantee that these terminals had not been modified
7 since '97 since they've been out of Hughes' hands since
8 purportedly '95. It is relevant whether customers had modified
9 terminals.

10 And Mr. Messineo said he didn't know how these
11 terminals ended up with -- with counsel's litigation
12 consultant. He just -- they had just been provided to him by
13 counsel.

14 And then on the next slide when we asked him do you
15 know you what changes, if any, underwent in the -- in the
16 remote, he said he didn't think it looked like there were
17 changes, but he couldn't say for certain, and so he couldn't
18 confirm.

19 I asked him if he opened up the box, and he said he
20 hadn't opened up the box to see if anything had been modified,
21 which we think is -- is important if they're going to say this
22 is all as it existed before '97.

23 On the next slide, tying back to Dr. Wicker, because,
24 remember, Dr. Wicker was the witness who they had told us in
25 discovery they were going to try to get this through. And in

1 Dr. Wicker's deposition -- on the next slide, please. This was
2 back in March. We asked him you were informed that the
3 terminals were purchased from a third party, and he said he
4 hadn't -- he hadn't been informed of that and didn't know it to
5 be the case.

6 And then we asked him, would you have -- would you
7 have asked whether any modifications were made, and he said --
8 would have wanted to know that and he said, yeah, I would want
9 to know whether it was reflective of the actual operation of a
10 PES system in the early '90s. So under Dr. Wicker's own
11 testimony, questions that should have been answered were not
12 answered.

13 Next, the outdoor unit, Your Honor, this is what sits
14 up on the roof. This is basically the antenna for the
15 terminal, and this was not available for inspection. We didn't
16 see the actual outdoor unit because it was on the roof. And
17 the long and short of this is Mr. Messineo couldn't
18 authenticate the date of that. That's also -- that's part of
19 the terminal. He thought it had been there since 2001.

20 Next, the console, this is -- this is -- admittedly,
21 Your Honor, the monitor is an old one, probably from the early
22 '90s. Key board and mouse certainly looked to me to be from
23 the early '90s. I don't have any bones to pick there.

24 But the DAT drive, that's what you see on the right,
25 it's a little bit hard to see, that's the drive that they

1 actually loaded the software on to the system with, so that's
2 how you get the software on to the terminals and the hub.

3 And we said -- and he -- he candidly expressed he
4 tried to use old -- old machinery for everything, but the
5 system that actually loaded this software on to the machine,
6 the smaller DAT drive, he -- he had admitted that those were
7 maybe newer than '97 and that they were used -- that type of
8 drive was used up until the end of PES, which was sometime in
9 the 2000's.

10 Next point, this was what was used to access the
11 internet in the demonstration. This was a new computer. This
12 was counsel's -- Hughes' counsel's computer that was used.
13 Mr. Messineo didn't know the vintage, but it was very clear
14 that the laptop was a new one, a modern one, not '97 era.

15 And the next one is the internet gateway. This is
16 what's actually feeding the internet connection into the hub,
17 and this is particularly prejudicial because they -- they
18 purport to show through the system that the PES could be used
19 to get on the internet.

20 And we asked what's the vintage of that equipment?
21 It was very clear it's a -- it's a 4G or 3G system from the
22 2010's, and Mr. Messineo just didn't know the vintage of it,
23 but agreed it was newer.

24 So that's the March through the testimony, Your
25 Honor. I suspect you may hear that none of this matters, that

1 the gateway and the -- and the laptop, whether they're pre or
2 post-'97 doesn't matter.

3 I don't know how you'll -- I don't know what the
4 explanation could possibly be for the actual internet IO cards
5 in the hub, how that couldn't possibly matter. That certainly
6 matters. Dr. Wicker agreed with that.

7 But the overall point is there's no testimony from
8 anyone, there's no expert testimony that would explain how
9 the -- how the -- that would separate the wheat from the chaff,
10 so to speak. Why does it not matter that part X is post-'97
11 and part Y is post-'97? Dr. Wicker was told it was all
12 pre-'97, or at least that's what his testimony suggests he
13 assumed it was.

14 So I think Dr. Wicker -- Dr. Wicker thought that
15 gate -- I think he knew the gateway and the laptop were
16 post-'97. I think he testified that wouldn't matter, but for
17 all the other things that are inside the demonstration system
18 itself, we would submit there's just too much there that's of
19 unknown origin or the wrong date.

20 THE COURT: On your slide four, you list the
21 Flexroute software, but you didn't separately address that.

22 MR. SUDARSHAN: That's right, Your Honor. I
23 apologize for that. I didn't -- I didn't put in a slide for
24 that.

25 The relevant point from Mr. Messineo's testimony on

1 that was he -- he believed that the software itself was -- was
2 pre-critical date, but he wasn't able to testify that that was
3 actually ever sent to customers before the date.

4 So he said I looked at the -- I did a read of the
5 data. I looked at the tape which had an October '97 date,
6 which is awfully close to the critical date, and he said
7 that's -- I believe that's the date where somebody loaded this
8 software on to this tape, but then when we asked him when -- do
9 you know when the tape went to customers, he couldn't confirm
10 that.

11 THE COURT: All right.

12 MR. SUDARSHAN: And I -- and -- yeah, I'll stop
13 there, Your Honor. I think I've shown you what I would like
14 to show you.

15 THE COURT: All right. Thank you, Mr. Sudarshan.

16 MR. PANKRATZ: Your Honor, I'm not sure the specific
17 objection to which I should address, so let me start with
18 authenticity.

19 THE COURT: I think that is the issue.

20 MR. PANKRATZ: The deposition of Mr. Messineo
21 proceeded and authenticated exactly what this equipment is.
22 There are broadly three pieces. There's the hub, there's the
23 Personal Earth Station 5000 terminal, and there is the
24 software that executes on the terminal and the hub.

25 Mr. Messineo made clear that all of the equipment

1 with the exception of the Personal Earth Station 5000 and its
2 remote, the outdoor unit, were from Hughes' own supplies, so he
3 has authenticated where that equipment came from and --

4 THE COURT: It's the date of the equipment that's
5 the issue; right? Is this something that could have existed
6 at the time that is relevant.

7 MR. PANKRATZ: And, Your Honor, I think perhaps an
8 analogy. This case is really about, for example, the
9 engine -- how does the engine of a 1952 car shift gears. If
10 they were to complain that you took a 1952 car with a 1952
11 engine and then drove it on a modern road with modern gas,
12 somehow means that the demonstration of the shifting of gears
13 is not relevant, that's -- that's basically what we're seeing
14 here.

15 The date of certain pieces like an antenna doesn't
16 matter. The antenna works the same, and they are welcome to
17 cross-examine Dr. Wicker and all of our witnesses with the lack
18 of dating on specific things.

19 THE COURT: What testimony do you have from anyone
20 that everything that matters preceded the date?

21 MR. PANKRATZ: Your Honor, the -- the software and
22 the Personal Earth Station 5000 terminals themselves are what
23 we view as the critical pieces, the engine that is the subject
24 here of this case, the software, as Mr. --

25 THE COURT: Who do I have -- I have your statement

1 that that's the critical part. What I need is testimony from
2 somebody who knows.

3 MR. PANKRATZ: Mr. Messineo confirmed that the
4 demonstration, that is one of the videos that was produced,
5 and there was another one used during the deposition that was
6 identical.

7 He confirmed -- and this is in his deposition at page
8 134 -- that it operated as a pre-1997 Personal Earth Station
9 system would have operated, and he was able to say that based
10 upon manuals that are pre-1997 that illustrate and describe
11 exactly how the Personal Earth Station system should work.

12 And so he was looking at the operation of
13 pre-critical date software operating on a terminal from which
14 the records -- and we have more testimony from Mr. Mohadjer
15 establishing exactly where this PES terminal came and went and
16 its chain.

17 But the crux of this is there is testimony from
18 Mr. Messineo establishing that pre-critical date software
19 running on a pre-critical date Personal Earth Station terminal
20 operated exactly as the manuals from pre-critical date said it
21 would.

22 And so that, Your Honor, I believe is testimony that
23 is -- that does establish that not only is this authenticate,
24 but it acts as an authenticate Personal Earth Station 5000
25 terminal would have operated.

1 THE COURT: And how do you respond to the components
2 that are listed out on the Plaintiff's slide four.

3 MR. PANKRATZ: I think -- Mr. Messineo testified
4 that he was confident that most of those were pre-1997. I
5 think they're picking on the fact that he can't say he
6 personally knows --

7 THE COURT: Well, show me that.

8 MR. PANKRATZ: So, for example, page 78 of
9 Mr. Messineo's deposition, and here he's discussing, for
10 example, modems.

11 These were old. They were -- and -- and he's talking
12 about how he knows they're older because he knows when he first
13 came on in 1999 that there were newer versions of the modem,
14 and these others that he has used for the demonstration
15 equipment were those that were used in the '80s and '90s.

16 Did he confirm the exact date? No. But is he able
17 to state under oath that they're pre-dating 1997? He's
18 confident that they are likely before 1997. And so, Your
19 Honor, I believe this testimony establishes that there is a
20 likelihood that these are pre-1997.

21 But, again, I would -- I would submit that the modems
22 here are not the point of the demonstration. The point of the
23 demonstration is to show the 1995 Personal Earth Station 5000
24 and the 1997 software running on it and how it operates.

25 THE COURT: How do we know that the way it's

1 operating with all these components is the same way it would
2 have operated in '97.

3 MR. PANKRATZ: If you can turn to page 14, please,
4 of Mr. Messineo's deposition, and here he's being asked about
5 the operation of the demonstration as the equipment worked,
6 starting at line five on 134.

7 Do you believe the Flexroute system that you
8 configured, do you believe it operated -- and to be clear, he
9 configured it according to a pre-critical date manual. He used
10 the instructions for something we have proven was sold before
11 the critical date.

12 Do you believe it operated in a manner as indicated
13 to you from your training as it would have operated prior to
14 November of '97?

15 Yes, I do believe.

16 Okay. Why do you believe that?

17 In all indications, the manual, the way it describes
18 Flexroute, the way it's supposed to operate and the way it's
19 being done or shown during the testing, that's operating the
20 way the manual said it would.

21 THE COURT: I think, given the hour, what I would
22 like to do is have the parties tender up a copy of
23 Mr. Messineo's deposition and let me review it overnight and
24 we'll resume the argument in the morning.

25 MR. PANKRATZ: We're checking to see if we have a

1 paper copy.

2 MS. FAIR: If we could send it electronically, I
3 don't know if that works for the Court. If the Court needs a
4 hard copy, we might need to search a little bit to see if we
5 have one that's not marked up.

6 MR. PONDER: I think we have one in the car, so --

7 THE COURT: That's fine, as long as I -- is there
8 other testimony that's important on this issue besides
9 Mr. Messineo's?

10 MR. PANKRATZ: I believe Mr. Mohadjer -- they've
11 made the point that they don't believe there is any chain
12 linking the Personal Earth Station 5000 terminal.

13 Mr. Mohadjer did testify about that, and he did
14 testify about the business record that verifies when it was
15 sold, in 1995 or 1997, that specific serial number.

16 And so I would submit that Mr. Mohadjer's testimony.
17 For background, he was a Hughes Network employee at the time
18 when the terminal, the specific terminal was sold to ThruComm.
19 He later bought ThruComm, and then sold that same terminal back
20 to Hughes.

21 THE COURT: Can you get me this evening also a copy
22 of that? If it's just one part of his deposition, then that's
23 all I really need, but I would like to see that also before we
24 resume in the morning.

25 MR. PANKRATZ: Yes, Your Honor, we will get you

1 that.

2 THE COURT: Okay. Then we're going to break now and
3 start back up at 8:30 in the morning.

4 COURT SECURITY OFFICER: All rise.

5

6 (Hearing concluded.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and
correct transcript from the stenographic notes of the
proceedings in the above entitled matter to the best of my
ability.

Date: 7/22/17

Tammy L. Goolsby, CSR
Deputy Official Court Reporter
State of Texas No.: 3101
Expiration Date: 12/31/18

Tammy Goolsby, CSR
903-445-5355

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